(1)

No. 91-5397-CFH
Status: GRANTED

Title: Emery L. Negonsott, Petitioner
v.
Harold Samuels, Warden, et al.

Docketed:
August 5, 1991

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Thompson,Pamela S.

Counsel for respondent: Stephan,Robert T.

Entry	Date	Note	Proceedings and Orders
1	Aug 5 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 12 1991		DISTRIBUTED. September 30, 1991
4	Sep 18 1991	P	Response requested -- JPS. (Due October 18, 1991)
5	Oct 18 1991		Brief of respondents Harold Samuels, et al. in opposition filed.
6	Oct 24 1991		REDISTRIBUTED. November 8, 1991
7	Nov 12 1991	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
9	Jun 4 1992		REDISTRIBUTED. June 19, 1992
10	Jun 10 1992	X	Brief amicus curiae of United States filed.
12	Jun 22 1992		REDISTRIBUTED. June 26, 1992
14	Jun 29 1992		Petition GRANTED.
			**********
16	Jul 24 1992		Order extending time to file brief of petitioner on the merits until August 31, 1992.
17	Jul 31 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Tenth Circuit.
18	Aug 7 1992		Joint appendix filed.
19	Aug 31 1992		Brief amici curiae of Devils Lake Sioux Tribe of Fort Totten Reservation, et al. filed.
20	Aug 31 1992		Brief of petitioner Emery Negonsott filed.
21	Sep 16 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Oct 5 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Oct 8 1992		Order extending time to file brief of respondent on the merits until October 26, 1992.
25	Oct 19 1992	G	Motion of Iowa Tribe of Kansas and Nebraska, et al. for leave to file a brief as amici curiae filed.
26	Oct 26 1992		LODGING consisting of seven pieces of correspondence received from amicus, Native American Rights Fund.
27	Oct 26 1992		Brief of respondents Harold Samuels, et al. filed.
28	Oct 26 1992		Brief amicus curiae of United States filed.
29	Oct 29 1992	G	Motion of the Solicitor General to permit William K. Kelley, Esquire, to present oral argument pro hac vice filed.
30	Nov 9 1992		Motion of Iowa Tribe of Kansas and Nebraska, et al. for leave to file a brief as amici curiae GRANTED.

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No. 91-5397-CFH

Entry	Date	Note	Proceedings and Orders
31	Nov 9 1992		Motion of the Solicitor General to permit William K. Kelley, Esquire, to present oral argument pro hac vice GRANTED.
32	Nov 20 1992		SET FOR ARGUMENT MONDAY JANUARY 11, 1993 (3RD CASE).
33	Nov 23 1992		CIRCULATED.
34	Dec 18 1992		Record filed.
		*	Certified proceedings United States District Court, District of Kansas.
35	Jan 11 1993		ARGUED.

(2)

91-5397

No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER, 1991

EMERY L. NEGONSOTT, Petitioner

v.

HAROLD SAMUELS and the ATTORNEY GENERAL OF THE STATE OF KANSAS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Pamela S. Thompson
Attorney for Petitioner
4400 Elkhorn Blvd., #117
Sacramento, California 95842
(916) 334-9155

35 pp

QUESTION PRESENTED

I. Whether 18 U.S.C. section 3243 confers criminal jurisdiction on the State of Kansas to prosecute Petitioner for the crime of aggrevated battery, one of the crimes enumerated in the Major Crimes Act, 18 U.S.C. section 1153.

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CASES

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OTHER AUTHORITIES

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on May 8, 1991.

OPINIONS BELOW

The May 8, 1991 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 933 F.2d 818 (10th Cir. 1991) and is reprinted in the separate Appendix to this Petition, page 44. The prior opinion of the United States District Court for the District of Kansas is unreported and is reprinted in the separate Appendix to this Petition, page 35.

The opinion of the Kansas Supreme Court is reported at 239 Kan. 127, 716 P.2d 585 (1986) and is reprinted in the separate Appendix to this Petition, page 21.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1991. The jurisdiction of this Court is invoked pursuant to 18

U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

This case involves 18 U.S.C. section 3243 which provides as follows:

Jurisdiction is conferred over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

This case also concerns the Major Crimes Act, 18 U.S.C. section 1153:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses,

namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A (18 U.S.C.S. section 2241, et seq.), incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title (18 U.S.C.S. section 661) within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

STATEMENT OF THE CASE

This is an Indian criminal jurisdiction

issue, challenging the jurisdiction of the State of Kansas to prosecute Petitioner for a crime enumerated in the Major Crimes Act, 18 U.S.C. section 1153.

Petitioner, Emery L. Negonsott is an enrolled member of the Kickapoo Tribe in Kansas and a resident of the Kickapoo reservation.

During 1985, Mr. Negonsott was arrested by the Brown County Sheriff for the crime of aggrevated battery for the shooting of another Kickapoo Indian. The crime occurred within the confines of the Kickapoo reservation. Mr. Negonsott was tried in the District Court of Brown County, Kansas and convicted of the offense after a jury trial. Judge Stevenson, the trial judge, relying on State of Kansas v. Mitchell, 231 Kan. 142, 642 P.2d 981 (1982), set aside the conviction for lack of criminal jurisdiction. The State of Kansas appealed Judge Stevenson's order to the Kansas Supreme Court, which reversed. State of Kansas v. Negonsott, 239 Kan. 127, 716 P.2d 585 (1986).

Petitioner's case was remanded to the Brown County District Court for sentencing and he was sentenced to a term of three to ten years. Petitioner served eighteen (18) months and is currently on parole.

Petitioner then filed a writ of habeas corpus with the United States District Court for the District of Kansas. On September 22, 1988 the writ was dismissed. The District Court ruled that based on the legislative history of 18 U.S.C section 3243 "the court concludes that Congress intended to grant the State of Kansas jurisdiction over all crimes committed by or against Indians on Indian reservations located in Kansas." The court further found that "Kansas courts and the Federal courts have concurrent jurisdiction over crimes that fall within the scope of the Federal Crimes Act, 18 U.S.C. section 1153."

The case was appealed to the Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. section 1291. The Court of Appeals upheld the decision of the lower court.

The decisions of both courts were based upon an erroneous interpretation of the legislative history surrounding the Kansas Act, 18 U.S.C. section 3243.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Resolve Conflicts Between the Court of Appeals for the Tenth Circuit and the Court of Appeals for the Eighth Circuit.

18 U.S.C. section 3243 provides:

Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

This section shall not deprive the courts of the United States of jurisdiction

over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The Tenth Circuit held that 18 U.S.C. section 3243 did not grant the federal courts exclusive jurisdiction over one of the crimes included in the Major Crimes Act, 18 U.S.C. section 1153 because the legislative history of the Kansas Act made it clear that Congress intended to confer jurisdiction over such acts on State courts.

This holding is in direct contradiction to a decision by the Court of Appeals for the Eighth Circuit which held, in reviewing the same legislative history, that an Iowa Act similar to the Kansas Act mandated exclusive federal jurisdiction. Youngbear v. Brewer, 415 F.Supp. 807 (N.D. Iowa 1976), aff'd, 549 F.2d 74 (8th Cir. 1977).

The Kansas Act is clearly ambiguous and both appellate courts agree with this argument. The first section of the statute appears to grant the State of Kansas general

criminal jurisdiction over offenses committed by or against Indians on Indian reservations, while the last section appears to retain exclusive federal jurisdiction over crimes listed in the Major Crimes Act, 18 U.S.C. section 1153.

As the court found in Youngbear, supra, a careful analysis of the legislative history of the Kansas Act leaves no doubt that Congress intended to preserve exclusive federal jurisdiction over an Indian defendant who commits one of the "major crimes."

The statute as originally drafted provided:

Be it enacted ... That concurrent jurisdiction is hereby relinquished to the State of Kansas to prosecute Indians and others for offenses by or against Indians or others, committed on Indian reservations in Kansas, including trust or restricted allotments, to the same extent as its courts have jurisdiction for offenses committed elsewhere within the state in

accordance with the laws of the State; and section 328 of the Act of March 4, 1909 (35 Stat. 1152), as amended by the Act of June 28, 1932 (47 Stat. 337), and sections 2145 and 2146 of the United States Revised Statutes (U.S.C., title 18, section 548, title 25, secs. 217, 218 are modified accordingly insofar as they apply to Indian reservations or Indian country in the said State of Kansas. 86 Cong. Rec. 5596, 76th Cong. 3rd Sess. (May 6, 1940). (Emphasis added.)

A subsequent amendment eliminated the reference to concurrent jurisdiction and the modification of the Major Crimes Act:

That jurisdiction is hereby conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State: Provided, however, That nothing herein contained shall deprive the courts of the United State of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations. 86 Cong. Rec. 5596, 76th Cong. 3rd Sess. (May 6, 1940).

It is this version, with minor modifications, that subsequently became the law.

Three documents are part of the legislative history. One is a letter from then United States Congressman, W.P. Lambertson, dated April 17, 1940. The other two documents consist of a letter from then Acting Secretary of the Interior, E.K. Burlew and an undated memorandum submitted by the Department of the Interior enclosed with Mr. Burlew's letter. In analyzing the Kansas Act, the District Court and the Court of Appeals placed unwarranted emphasis on the documents from the Department of the Interior while completely ignoring the letter from Congressman Lambertson.

Petitioner contends that the letter

and memorandum from the Department of the Interior refer to the original version of the statute as quoted above. This version of the statute was drafted by the Interior Department and would have explicitly granted concurrent jurisdiction to the courts of the State of Kansas and the federal courts. This version would also have amended the Major Crimes Act as it pertained to Indians residing on reservations in the State of Kansas. Youngbear v. Brewer, supra, at page 813, n. 5. This contention is supported by the language found in the letter and memorandum. For example, the memorandum accompanying Secretary Burlew's letter speaks of the intention to confer jurisdiction over all criminal offenses, including those listed in the Major Crimes Act:

> The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes ... The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable. H.R. Rep. No. 1999, at 5 and S. Rep. No. 1523, at 4.

Additionally, the letter from Mr. Burlew makes it clear that the letter and memorandum are only referring to the statute as originally drafted:

> However, the bill, as now worded, does not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to relinquish concurrent jurisdiction to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing

to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law. H.R. Rep. No. 1999, at 3 and S. Rep. No. 1523, at 2. (Emphasis added.)

The letter and memorandum also reflect the fact that jurisdiction was to be given to Kansas for only minor crimes:

As the Indian Service is not now in a position to establish a law and order set-up on these four reservations, the superintende is of the opinion that the maintenance of law and order will get into a precarious condition if the State authorities are not permitted to continue giving the Indians police protection. H.R. Rep. No. 1999, at 5, S. Rep. No. 1523, at 4.

The Secretary was referring to the establishment of tribal courts on the four reservations. Tribal courts have never had jurisdiction

to prosecute defendants for violations of the crimes included in the Major Crimes Act. Therefore, the Secretary must have been referring to the punishment of minor crimes by the State of Kansas.

Petitioner concedes that the language of the Kansas Act as proposed by Secretary Burlew is the same as that eventually passed into law. However, Congress must have chosen not to accept the Secretary's interpretation of 18 U.S.C. section 3243, otherwise Congressman Lambertson's letter would have spoken to "major" as well as "small" offenses.

This letter states as follows:

I want to urge that you recommend out of the committee H.R. 3048 with the requested change in language in one place. All parties are agreed on this bill - the Indians, the superintendent, the Indian agencies on the Kansas reservations, which are all in my district, and the people that are on and surround the reservations.

This bill has been O.K.'d by the Indian

office through the Indian Department and I understand by the Department of Justice and no objection found to it by the Budget. The Government here relinquishes to the State full jurisdiction over the Indians for small offenses. It will be in the interest of law and order and a unified law enforcement ... H.R. Rep. 1999, 76th Cong., 3rd Sess. 2 (1940). (Emphasis added.)

This letter clearly shows that Congress did not intend to relinquish jurisdiction over the major crimes to the State of Kansas. The Court of Appeals for the Tenth Circuit agreed with this interpretation in another case:

(the) most persuasive evidence of Congressional intent is a letter written by Representative W.P. Lambertson, a Kansas congressman, urging approval of the amended version of the bill. This letter which is contained in the House Report states: 'The Government relinquishes to the State full jurisdiction over the Indians for small offenses.' (citations omitted.)

Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas, 787 F.2d 1434, 1440 (10th Cir. 1986).

Petitioner's analysis of the legislative history is consistent with the analysis by Judge McManus in Youngbear v. Brewer, supra, and upheld by the Court of Appeals for the Eighth Circuit.

In Youngbear v. Brewer, supra, the defendant was a member of the Sac & Fox Tribe. He was prosecuted by the State of Iowa for the crime of murder, one of the major crimes. The Iowa Supreme Court affirmed the conviction, rejecting Mr. Youngbear's argument that the courts of Iowa lacked jurisdiction to prosecute him. Since the law granting criminal jurisdiction to Iowa, Act of June 30, 1948, Ch. 759, 62 Stat. 1161, Pub. L. No. 846, was the same as 18 U.S.C. section 3243, Judge McManus analyzed the legislative history of the Kansas Act to determine congressional

intent with regard to the Iowa Act. In his analysis of the legislative history of 18 U.S.C. section 3243, Judge McManus stated:

Also pertinent is the legislative history of a statute whose operative language is identical with that of P.L. 846 except for the designation of the State of Kansas rather than Iowa. That statute (citations omitted) was cited as the model to which Pub. L. 846 could be compared. H.R. Rep. 2356 at 3. The original draft of the bill conferring jurisdiction on the State of Kansas (citations omitted), did state that concurrent jurisdiction was relinquished to the State, and further expressly provided that 18 U.S.C. section 548 (Federal Major Crimes Act as then codified) was modified accordingly. (citations omitted) This bill was rejected, and the substituted bill which was subsequently enacted did not contain either the term 'concurrent' or the clause modifying the effect of the Federal Major Crimes Act. By deleting this

language, the only intent which can reasonably be inferred to Congress was to preserve exclusive Federal jurisdiction over the major crimes.

Evidence of this intent also appears in a letter from Representative W.P. Lambertson, a Kansas congressman whose district was affected by the bill. The letter, appearing in the report of the House Committee on Indian Affairs, H.R. Rep. 1991 at 2, 76th Cong. 3rd Sess. (1940), states that 'The Government here relinquishes to the State full jurisdiction over the Indians for <u>small offenses</u>.'

<u>Youngbear v. Brewer</u>, supra, at pages 812-813.

Judge McManus dismissed the letter from Secretary Burlew:

Respondent cites a letter from then Acting Secretary of Interior which suggests that the bill would grant concurrent jurisdiction over the major crimes. H.R. Rep. 1999, 76th Cong., 3rd Sess. (1940). However, it appears that the letter refers to the

original bill, which was drafted by the Interior Department and would have explicitly granted concurrent jurisdiction. Id., at page 813, n. 5.

The Court of Appeals for the Eighth Circuit upheld the decision of Judge McManus stating:

Judge McManus fully and extensively discussed the applicable case law and legislative history and we are persuaded by his reasoning.

Accordingly, we affirm on the basis of that opinion. (citation omitted.) Youngbear v. Brewer, 549 F.2d 74, 76 (8th Cir. 1977).

The decisions of the District Court and the Court of Appeals are clearly erroneous. These decisions ignore the most persuasive evidence of Congressional intent contained in the legislative history of the Kansas Act, violate the canons of construction as set forth by this Court in Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), and work an unlawful

repeal of the Major Crimes Act as it pertains to the Indians in Kansas.

CONCLUSION

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

Pamela S. Thompson
4400 Elkhorn Blvd. #117
Sacramento, CA 95842
(916) 334-9155
Attorney for Petitioner

APPENDIX

STATE OF KANSAS,

Appellant,

-vs-

BERNICE NIOCE,

Appellee,

and

STATE OF KANSAS,

Appellant,

-vs-

EMERY L. NEGONSOTT,

Appellee.

SYLLABUS BY THE COURT

Congress' intent in enacting 18 U.S.C. section 3243 (1982) was to grant the State of Kansas jurisdiction over all crimes committed by or against Indians on Indian reservations located in Kansas. The United States retains concurrent jurisdiction with Kansas over crimes listed in the Federal Major Crimes Act. 18 U.S.C. section 1153 (1982). (Overruling State v. Mitchell, 231 Kan. 144, 642 P.2d 981 (1982)).

No. 58,328, appeal from Jackson district court, TRACY D. KLINGINSMITH, judge; No. 58,530, appeal from Brown district court, WILLIAM L. STEVENSON, judge. Opinion filed March 28, 1986. Reversed and remanded.

Michael A. Ireland, county attorney, argued the cause, and Robert T. Stephen, attorney general, was with him on the brief for appellant in case No. 58,328.

Timothy G. Madden, assistant attorney general, argued the cause, and Robert T. Stephen, attorney general, and Phillip A. Brudick, county, were with him on the brief for appellant in case No. 58,530.

William E. Enright, of Topeka, argued the cause and was on the brief for appellee Nioce.

Robert L. Tabor, of Topeka, argued the cause for appellee Negonsott.

These consolidated actions raise the issue of whether the State of Kansas has jurisdiction over criminal offenses committed by or against Indians on Indian reservations

located within this state. While the facts are not essential for resolution of this issue, they are briefly stated as follows:

Appellee Bennie Nioce is an American Indian who allegedly committed aggrevated battery upon another American Indian while on the Pottawatomie County Indian Reservation in Jackson County, Kansas. The Jackson County District Court, relying on our holding in State v. Mitchell, 231 Kan. 144, 642 P.2d 981 (1982), dismissed the charges against Nioce. Identical charges were subsequently reinstated against Nioce, based upon a recent decision of the Federal District Court of Kansas, Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas, No. 83-4304 (D. Kan. 1984). The federal court concluded Mitchell was wrongly decided. The Kansas trial court, however, once again dismissed the charges against Nioce, following Mitchell.

Appellee, Emery Negonsott is a Kickapoo Indian who is charged with aggrevated battery

for the shooting of another Kickapoo Indian. The shooting occurred within the territorial confines of the Kickapoo Indian Nation Reservation, located in Brown County, Kansas. He was convicted by jury of the crime charged but the district court, relying on Mitchell subsequently set aside the conviction for lack of jurisdiction.

The State appeals, urging the court to reconsider its decision in Mitchell and give Kansas jurisdiction over all crimes committed by or against Indians on Indian reservations in Kansas.

The primary issue is whether the State of Kansas has jurisdiction to try the appellants for the crime of aggrevated battery. Resolution of this issue depends upon our interpretion of 18 U.S.C section 3243 (1982):

"Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same

extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

"This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

The first provision of this statute is clear and appears to confer jurisdiction on the State of Kansas over all offenses committed by or against Indians on Indian reservations within the State. However, the second paragraph renders the statute ambiguous as it preserves federal jurisdiction over "offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

Appellees argue the Federal Major Crimes Act, codified at 18 U.S.C. section 1153 (1982), grants exclusive federal jurisdiction over Indian offenses. That statute provides in part:

"Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

We first had occasion to interpret 18 U.S.C. section 3243 in State v. Mitchell, 231 Kan. 144, 642 P.2d 981 (1982). There, the defendant was charged with murder in the second degree. Both the defendant and the victim were "Indians" and the offenses

occurred within "Indian country" as those terms are defined in 18 U.S.C. section 1151 et seq. (1982). The defendant argued 18 U.S.C. section 1153 granted exclusive federal jurisdiction over Indian offenses, while the State contended 18 U.S.C. section 3243 gave Kansas concurrent jurisdiction. After examining the legislative history of the statutes in question, we determined that Congress, in enacting 18 U.S.C. section 3243, intended to retain exclusive jurisdiction over the crimes specifically enumerated in 18 U.S.C. section 1153, including murder. Therefore, we held the State acted beyond the scope of its jurisdictional authority in trying the defendant for murder.

The court, in so holding, relied primarily upon the case of Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), aff'd 549 F.2d 74 (8th Cir. 1977). There, the federal court interpreted an identical grant of jurisdiction to Iowa, and held that Congress intended to preserve exclusive federal jurisdiction over the major crimes.

This court in Mitchell and the federal court in Youngbear cited the legislative history of 18 U.S.C. section 3243 as support for their interpretation of the statute. The original draft of the bill conferring jurisdiction onthe State of Kansas specifically provided that concurrent jurisdiction was relinquished to the State and further provided that the Federal Major Crimes Act be modified accordingly. 86 Cong. Rec. 5596, 76th Cong. 3d Sess. (May 6, 1940). A subsequent committee amendment, however, rejected the references to concurrent jurisdiction and modification of the Major Crimes Act. We concluded, as did the Youngbear court, that deletion of this language clearly indicated Congress' intent to preserve exclusive federal jurisdiction over the major crimes and to give Kansas jurisdiction only over minor offenses. State v. Mitchell, 231 Kan. at 150. See also Youngbear v. Brewer, 415 F. Supp. at 813.

The State now urges us to reexamine Mitchell in light of the Federal District Court of Kansas decision in Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas, No. 83-4304 (D. Kan. 1984).

In Iowa Tribe, the plaintiff sought a declaratory judgment that 18 U.S.C. section 3243 does not make Kansas gambling laws prohibiting the sale of "pull-tab cards" applicable to such activities on the Iowa Indian reservation. The State counterclaimed, seeking a declaration that 18 U.S.C section 3243 grants jurisdiction over Indians for acts occurring on the reservation which are recognized as crimes under Kansas law. The federal district court concluded that 18 U.S.C section 3243 confers complete (but not exclusive) criminal jurisdictionupon the State of Kansas. In reaching its decision, the district court considered additional relevant legislative history to 18 U.S.C section 3243 not considered by this court in Mitchell or the federal district court

in Youngbear.

Specifically, the court considered the report of E.K. Burlew, Acting Secretary of the Interior, to Representative Will Rogers, Chairman of the House Committee on Indian Affairs, and Senator Elmer Thomas, Chairman of the Senate Committee on Indian Affairs. This report consisted of a letter and memorandum discussing the purpose and effect of the proposed legislation.

As noted by the federal Court in Iowa Tribe, Burlew's letter indicates the purpose of the legislation was to allow Kansas courts to continue punishing offenses committed on Indian reservations, including offenses covered by federal statutes. The relevant portion of Burlew's letter follows:

With the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, including those covered by Federal statutes.

The legality of this practice being questioned recently, the tribal councils of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance by a transfer of jurisdiction to the State." (Emphasis added.) H.R. Rep. No. 199, 76th Cong., 3d Sess. 2 (1940); S. Rep. No. 1523, 76th Cong., 3d Sess. 2 (1940).

The Department of Interior memorandum accompanying Secretary Burlew's letter leaves little doubt that 18 U.S.C section 3243 was intended to confer jurisdiction to Kansas over all criminal offenses, including those listed in 18 U.S.C section 1153. The memorandum provides in pertinent part:

"The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes; the Indians

desire that they continue to do so; and a division of jurisdiction with respect to particular crimes based upon the place of their commission is rendered undesirable by the mutual interspersion of restricted and unrestricted holdings. The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable." (Emphasis added.) H.R. Rep. No. 1999, at 5 and S. Rep. No. 1523, at 4.

Additionally, the memorandum clarifies the reason why the original version of the House and Senate bills, which contained a reference to the relinquishment of concurrent jurisdiction to Kansas, was later modified to delete that reference:

"(The House and Senate Bills did) not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to 'relinquish

concurrent jurisdiction' to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal Law." (Emphasis added.) H.R. Rep. No. 1999, at 3 and S. Rep. No. 1523, at 2.

The Iowa Tribe case is now on appeal to the Tenth Circuit Court of Appeals. This pending appeal has no bearing on our consideration of this issue since the supremacy clause of the United States Constitution is invoked only by a decision of the United States Supreme Court.

However, we find Judge O'Connor's opinion in Iowa Tribe persuasive and conclude from the additional legislative history considered therein that Congress' intent in enacting 18 U.S.C. section 3243 was to grant the State of Kansas jurisdiction over all crimes committed by or against Indians on Indian reservations located in Kansas. The United States retains concurrent jurisdiction with Kansas over crimes listed in the Federal Major Crimes Act. 18 U.S.C. section 1153.

We hold that State v. Mitchell, 231 Kan. 144, 642 P.2d 981 (1982), is overruled and the judgment of the trial courts are reversed and the cases remanded for appropriate action.

SCHROEDER, C.J., dissenting.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

EMERY L. NEGONSOTT,

Petitioner

v. CIVIL ACTION NO. 88-3049-S

HAROLD SAMUELS, et al.,

Respondents.

MEMORANDUM AND ORDER

This matter is before the court on a petition for writ of habeas corpus filed pursuant to 28 U.S.C. setion 2254. Petitioner, an inmate at the Kansas State Penitentiary, Lansing, Kansas, alleges that Kansas lacks jurisdiction over his criminal acts.

Petitioner is a Kickapoo Indian who was charged with aggrevated battery for the shooting of another Kickapoo Indian within the territorial confines of the Kickapoo Indian Nation Reservation. Because the reservation is located within Brown County, Kansas, petitioner was tried before a jury in the district court of Brown County.

Although the jury found petitioner guilty, the district court set aside the conviction for lack of jurisdiction. Upon appeal by the State, the Kansas Supreme Court upheld petitioner's conviction and held that Kansas had jurisdiction over all crimes committed by or against Indians on Indian reservations in Kansas. State v. Nioce, 239 Kan. 127, 716 P.2d 585 (1986).

DISCUSSION

The only issue before this court is whether Kansas had jurisdiction over Indian offenses falling within the scope of the Federal Major Crimes Act. 18 U.S.C. section 1153. To decide this issue, the court must interpret federal statute 18 U.S.C. section 3243, which provides:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction

over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The apparent ambiguity of the statute is created by the language of the second paragraph. Although the first paragraph appears to confer jurisdiction on the State of Kansas over all Indian offenses committed within the state, the second paragraph's reservation of federal jurisdiction makes the extent of this conveyance ambiguous.

Petitioner argues that 18 U.S.C. section 3243 provides for exclusive federal jurisdiction for crimes falling within the scope of the Federal Major Crimes Act. 18 U.S.C. section 1153. Because aggrevated battery is covered by the Federal Major Crimes Act, petitioner argues that Kansas lacks jurisdiction over his offense. In contrast, respondent argues that 18 U.S.C. section 3243 grants Kansas jurisdiction over all offenses committed by or against Indians on Indian reservations within the state.

This case is not the first time this

court has been asked to interpret 18 U.S.C. section 3243. In Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas, No. 83-4304 (D. Kan. May 30, 1984), this court was faced with the issue of whether the State of Kansas had jurisdiction to prosecute members of the Iowa Tribe of Indians of Kansas and Nebraska for selling "pull-tab cards" in connection with bingo games conducted on the Tribe's reservation, Interpreting the statute in light of its legislative history, this court concluded that Kansas had "jurisdiction over non-major state offenses committed by or against Indians on Indian reservations located in the state of Kansas. On appeal, the Tenth Circuit Court of Appeals affirmed this court's decision. Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas, 787 F.2d 1434 (10th Cir. 1086). Because the sale of "pull-tab cards" did not fall within the scope of the Federal Major Crimes Act, neither this court nor the Tenth Circuit

Court of Appeals reached the issue raised by this case.

Like the Kansas Supreme Court in Nioce and the Tenth Circuit Court of Appeals in Iowa Tribe, this court finds persuasive the legislative history of 18 U.S.C. section 3243. Of particular relevance is the report of E.K. Burlew, Acting Secretary of the Interior, to Representative Will Rogers, Chairman of the House Committee on Indian Affairs. This report, contained in House Report No. 1999, 76 Cong., 3rd Sess. (1940), consists of a letter and memorandum discussing the purpose and effect of the proposed legislation.

In his letter, Burlew explained the two main reasons for introducing the proposed legislation. First, Burlew noted that the federal criminal statutes applicable to Indian reservations were limited in scope and left some major crimes as well as most minor offenses outside the jurisdiction of the federal courts. H.R. Rep. No. 1999,

76th Cong., 3rd Sess. 2 (1940). Second, Burlew explained that, because more than two-thirds of the area within the reservation boundaries had passed beyond federal criminal jurisdiction due to the issuance of unrestricted patnents, administrative convenience necessitated extending jurisdiction to Kansas over criminal matters. Id.

Burlew further explained that the proposed legislation was a codification of the ongoing practice in Kansas:

> With the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, including those covered by Federal statutes. The legality of this practice being questioned recently, the tribal counsels (sic) of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance by a transfer of jurisdiction to the State.

Id.

Later in his report, Burlew made it clear that the proposed legislation was intended to confer complete jurisdiction upon the State of Kansas, with the result that the Kansas courts and Federal courts would have concurrent jurisdiction over

crimes falling within the scope of the

Major Crimes Act:

> The bill proposes to "relinquish concurrent jurisdiction" to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining, however, jurisdiction in Federal courts to prosecute crimes by or against Indians defined by Federal law.

Id.

That this was the purpose of the statute

is further supported by the Department

of the Interior memorandum accompanying

Burlew's letter:

> This proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes; the Indians desire that they continue to do so; and a division of jurisdiction with respect to particular crimes based upon the place of their commission is rendered undesirable by the mutual interspersion of restricted and unrestricted holdings. The prosecution in the Federal courts of those offenses which are not open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable.

Id. at 4.

Based upon the legislative history

of the statute in question, the court concludes

that Congress intended to grant the State

of Kansas jurisdiction over all crimes

committed by or against Indians on Indian

reservations located in Kansas. The court

also finds that the Kansas courts and the

Federal courts have concurrent jurisdiction

over crimes that fall within the scope

of the Federal Crimes Act, 18 U.S.C. section

1153.

Having reached this conclusion, the

court finds that the petition for writ

of habeas corpus currently before the court

must be dismissed. Pursuant to 18 U.S.C.

section 3243, Kansas had jurisdiction over

the aggrevated battery committed by petitioner,

notwithstanding the fact that the crime

fell within the scope of the Federal Major

Crimes Act. 18 U.S.C. section 1153.

IT IS THEREFORE ORDERED that the petition for writ of habeas corpus be dismissed and all relief denied. The clerk of the court is directed to transmit a copy of this Memorandum and Order to petitioner and to the Office of the Attorney General for the State of Kansas.

DATED: This 22nd day of September, 1988, at Kansas City, Kansas.

/s/
DALE E. SAFFELS
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

EMERY L. NEGONSOTT,

Plaintiff-Appellant,

v. No. 88-2666

HAROLD SAMUELS and THE ATTORNEY GENERAL OF THE STATE OF KANSAS,

Defendants-Appellees.

Appeal from the United States District Court for the District of Kansas

(D.C. No. 88-3049-S)

Pamela S. Thompson, Kansas City, Kansas, for Plaintiff-Appellant.

Timothy G. Madden, Special Assistant Attorney General, Department of Corrections, Topeka, Kansas, for Defendants-Appellees.

Before HOLLOWAY, Chief Judge, SEYMOUR, and EBEL, Circuit Judges.

SEYMOUR, Circuit Judge.

This habeas case requires us to determine the scope of criminal jurisdiction granted by 18 U.S.C. section 3243 (1988) to the

State of Kansas over state-law offenses committed by Indians on Indian lands. Petitioner, Emery L. Negonsott claims that Kansas lacked subject matter jurisdiction to prosecute him for aggrevated battery because that offense is within exclusive federal jurisdiction under the Federal Major Crimes Act, 18 U.S.C. section 1153 (1988). The district court held that the State had jurisdiction. We agree and conclude that the federal grant of criminal jurisdiction to the State of Kansas in section 3243 extends to state-law offenses that are also crimes enumerated in the Major Crimes Act.

I.

Negonsott belongs to the Kickapoo Tribe and resided during 1985 on the Kickapoo reservation in Brown County, Kansas. He was arrested, charged, and convicted in that year of aggrevated battery in the District Court of Brown County for shooting another Kickapoo Indian on the Kickapoo

reservation. See Kan. Stat. Ann. section 21-3414 (1988). The state trial judge, relying on State v. Mitchell, 231 Kan. 144, 642 P.2d 981 (1982), vacated the conviction for lack of subject matter jurisdiction. On appeal, the Kansas Supreme Court reversed in a decision overruling Mitchell, and Negonsott's case was remanded for sentencing. See Kansas v. Nioce, 239 Kan. 117, 716 P.2d 585 (Kan. 1986). Negonsott was sentenced to imprisonment for a term of three to ten years.

Negonsott filed a petition for a writ of habeas corpus in the United States District court for the District of Kansas, continuing his claim that the State of Kansas lacked jurisdiction to convict him for the offense of aggrevated battery as defined by Kansas state law. The district court denied the writ and Negonsott appeals.

II.

The sole issue in this case is whether 18 U.S.C. section 3243 confers jurisdiction

on the State of Kansas to prosecute petitioner, a Kickapoo Indian, for the state-law crime of aggrevated battery against another Indian committed on the reservation. This question of statutory interpretation is one of law, which we review de novo. See Ross v. Neff, 905 F.2d 1349, 1352 (10th Cir. 1990).

In analyzing the criminal jurisdiction of the State of Kansas over crimes involving Indians committed on Indian land, we begin with the language of the relevant statutes. It is elementary that "(i)n construing a statute we are obliged to give effect, if possible, to every word Congress used." Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). If a statute is susceptible to two meanings, a court will choose a meaning that gives full effect to all the provisions of the statute. See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985). Moreover, statutes should be construed so that their provisions are harmonious with each other.

See United States v. Stauffer Chemical Co., 684 F.2d 1174, 1184 (6th Cir. 1982).

The statute under which the State of Kansas claims subject matter jurisdiction provides:

> "Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its court have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> "This section shall not deprive the courts of the United State of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

18 U.S.C. section 3243 (emphasis added). The second sentence of this statute appears to refer in part to the Indian Major Crimes Act, which provides:

> "(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, ... within the Indian Country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within

the exclusive jurisdiction of the United States.

"(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

18 U.S.C section 1153 (1988) (emphasis added). A separate statute governs the jurisdiction and venue of the Major Crimes Act as follows:

"All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States."

18 U.S.C section 3242 (1988) (emphasis added).[1]

1. The predecessor to sections 1153 and 3242 was initially passed in 1885 in response to the Supreme Court's opinion in Ex Parte Crow Dog, 109 U.S. 556 (1883), which held that the limited jurisdiction of the federal courts did not extend to crimes by an Indian against another Indian on an Indian reservation. See United States v. Kagama, 118 U.S. 375, 383 (1886). In the original enactment, what are now sections 1153 and 3242 were combined in one provision. Act of March 3, 1885, ch. 341, section 9, 23 Stat. 385.

The crimes of assault with a dangerous weapon and assault resulting in serious bodily injury, named in the Major Crimes Act, are defined for purposes of federal jurisdiction at 18 U.S.C section 113(c) & (f) (1988). Federal jurisdiction over major crimes committed by Indians has been held to be exclusive. See United States v. John, 437 U.S. 634, 651 (1978); United States v. Antelope, 430 U.S. 641, 649 n. 12 (1977); Seymour v. Superintendent, 368 U.S. 351, 359 (1962); see also Langley v. Ryder, 778 F.2d 1092, 1096 n. 2 (5th Cir. 1985) (holding that section 1153 preempts state criminal jurisdiction, citing John). Negonsott contends that the Kansas Act did not confer jurisdiction on the Kansas state courts over those corresponding state law offenses which are also included in the Major Crimes Act and which are otherwise within exclusive federal jurisdiction.

The first sentence of the Kansas Act at issue here, see supra at 4, unambiguously

confers criminal jurisdiction on the State of Kansas over offenses committed by Indians against Indians on Indian reservation land "to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the state." 18 U.S.C. section 3243 (emphasis added). In other words, the grant of state jurisdiction over all types of state crimes is complete. The second sentence of the Kansas Act appears intended to ensure that the congressional grant of jurisdiction to Kansas state courts over state-law crimes contained in the first sentence would not "deprive" the United States of its jurisdiction over federally-defined offenses committed by or against Indians on Indian reservations. An ambiguity exists, however, because as we have noted federal jurisdiction over major crimes committed by Indians would otherwise be exclusive. Thus, we must resolve whether Congress intended to grant

Kansas courts concurrent jurisdiction with federal courts over the crimes enumerated in the Major Crimes Act, or whether by the second sentence of the Kansas Act Congress intended to retain exclusive jurisdiction in the federal courts over those specific crimes.

The second sentence of the Kansas Act is of little help in resolving this conflict, since the words "shall not deprive the courts of the United States of jurisdiction" may be read in at least two ways. Congress may have intended, as argued by Negonsott, that the Kansas Act not deprive the federal court of any exclusive jurisdiction it enjoyed under existing law. Or, Congress may have meant to preserve the scope of federal jurisdiction over federally-defined crimes on Indian land, while modifying the exclusive jurisdiction of the federal courts in favor of concurrent jurisdiction where the federally defined crimes and crimes under Kansas law overlapped.

In resolving this ambiguity, we are mindful that "statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" Bryan v. Itasca County, 426 U.S. 373, 392 (1975) (quoting Alaska Pac. Fisheries v. United States, 248 U.S. 78, 79 (1918)). However, "statutory provisions which are not clear on their face may 'be clear from the surrounding circumstances and legislative history.'" Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 n. 17 (1978) (citing DeCoteau v. District County Court, 420 U.S. 425, 447 (1975)); see also Jones v. Intermountain Power Project, 794 F.2d 546, 552 (10th Cir. 1986). We accordingly look to legislative history to detemine whether Congress intended to affect the exclusivity of federal jurisdiction over enumerated major crimes committed by Indians by passing the Kansas Act.

In enacting the Kansas Act, both the

House and Senate Committees on Indian Affairs submitted reports. These reports incorporated a letter from the Acting Secretary of the Interior to the Chairman of the House Committee on Indian Affairs concerning the bill. The letter explained the problems the legislation was designed to address and how the bill intended to solve them. See Letter from E.K. Burlew, Acting Secretary of the Interior, to Rep. Will Rogers, Chairman of the House Committee on Indian Affairs, reprinted in H.R. Rep. No. 1999, 76th Cong., 3d Sess. 2 (1940) (House Report); see also Sen. Rep. No. 1523, 76th Cong., 3d Sess. 1-3 (1940). The Secretary noted that federal jurisdiction over crimes concerning Indians on Indian land had been limited, leaving "some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts." House Report at 2. Because the state lacked jurisdiction over such offenses, maintenance of law and order depended on the tribal courts,

which had not functioned on Kansas reservations for many years. To fill this void, and

> "(w)ith the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, including those covered by Federal statutes. The legality of this practice being questioned recently, the tribal councils of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance by a transfer of jurisdiction to the State."

Id. (emphasis added).

The Secretary also noted that the issuance of unrestricted patents for alloted lands interspersed with tribal and restricted lands created a jurisdictional checkerboard, resulting in practical difficulties. These difficulties

> "can be most effectively met by conferring criminal jurisdiction over the entire area on the State. These considerations of administrative convenience extend to those offenses which are now cognizable in the Federal courts under the reservation statutes as well as those which are not."

Id. (emphasis added. Although the proposed legislation extended to the types of offenses then cognizable under federal law, the Secretary specifically observed that "(e)nactment

of the bill will not prevent the prosecution in the Federal courts of those acts which are within the cognizance of these courts under existing law." Id. at 2-3. These comments in the House and Senate Reports reflect an understanding that the proposed legislation would legalize the State's assertion of complete criminal jurisdiction under state law over the Indian tribes without depriving the federal court of its more limited criminal jurisdiction by virtue of preexisting jurisdictional grants such as the Major Crimes Act.

Like the court in Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), aff'd, 549 F.2d 74 (8th Cir. 1977) (construing analogous Iowa Act)[2]

2. The Eighth Circuit in Youngbear interpreted a Congressional grant of criminal jurisdiction to the state courts of Iowa over the Sac and Fox Indians virtually identical to the grant of jurisdiction to the Kansas State Courts at issue here. See Act of June 30, 1948,ch. 759, 62 Stat. 1161, Pub. L. No. 846. The court relied on the legislative history of the Kansas Act, after which the Iowa Act was modeled, to support its conclusions that the Iowa Act did not confer state court jurisdiction over crimes enumerated in the Major Crimes Act. See 549 F.2d at 76.

Negonsott relies heavily on a letter from Representative W.P. Lambertson of Kansas to the House Committee on Indian Affairs in support of his position that the scope of the Kansas State Court's jurisdiction under the Kansas Act does not extend to offenses enumerated in the Major Crimes Act. In his letter in support of the legislation, Lambertson stated that "(t)he Government here relinquishes to the state full jurisdiction over the Indians for small offenses." House Report at 1-2 (emphasis added). Negonsott interprets this letter as necessarily implying that federal courts were to retain exclusive jurisdiction over major offenses. Although it is possible, of course, that Congressman Lambertson meant to imply by this statement that the State of Kansas would assume no jurisdiction over the types of crimes covered in the Major Crimes Act, this implication is by no means a necessary one. It is also possible that Representative Lambertson understood the bill to confer

"full" jurisdiction over small crimes occurring among Indians to fill the void left by the tribal courts, while conferring concurrent power to prosecute the types of crimes covered by the Major Crimes Act. If we give Negonsott's interpretation credence, we are at a loss to explan why it contravenes the memorandum and letter from the Secretary of the Interior, incorporated along with Representative Lambertson's letter into the House and Senate Reports, which clearly evince an understanding that Kansas under the Act as amended could exercise criminal jurisdiction over all state-law crimes occurring on Indian lands.

The Eighth Circuit in Youngbear and Negonsott also attach much significance to the amendment of the title of the bill, replacing the phrase "concurrent jurisdiction"

with the word "jurisdiction," [3] and eliminating the reference to modification of the Major Crimes Act. See 86 Cong. Rec. 5596-97, 76th Cong. 3d Sess. (May 6, 1940).[4] However, the

3. As originally drafted, the Kansas Act was entitled a "bill to relinquish concurrent jurisdiction to the State of Kansas to prosecute Indians or others for offenses committed on Indian reservations." H.R. Rep. No. 1999, 76th Cong., 3d Sess., accompanying H.R. 3048. This language was amended to read: "A bill to confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations." Id.

4. As originally drafted, the Kansas Act would have provided as follows:

"Be it enacted...that concurrent jurisdiction is hereby relinquished to the State of Kansas to prosecute Indians and others for offenses by or against Indians or others, committed on Indian reservations in Kansas, including trust or restricted allotments, to the same extent as its courts have jurisdiction for offenses committed elsewhere within the State in accordance with the laws of the State; and section 328 of the Act of March 4, 1909 (35 Stat. 1151) as amended by the Act of June 28, 1932 (47 Stat. 337) and sections 2145 and 2146 of the United States Revised Statutes *U.S.C., title 18, section 548, title 25, secs. 217, 218), are modified accordingly insofar as they apply to Indian reservations or Indian country in the said State of Kansas."

86 Cong. Rec. 5596, 76th Cong. 3d Sess. (May 6, 1940) (emphasis added).

Secretary, who recommended the revisions, offered an explanation in his letter. Regarding amendment of the title "for clarificatio he stated:

"(T)he bill, as now worded, does not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to relinquish concurrent jurisdiction to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by state law. However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law."

House Report at 3 (emphasis added). The term "concurrent jurisdiction" was thus removed because it did not accurately describe the bill in any of its forms. Federal courts did not exercise jurisdiction over all state-law offenses, and therefore those courts would not be sharing concurrent jurisdiction with Kansas over all crimes. Conversely, federal courts under the Major

Crimes Act possessed exclusive jurisdiction over the crime enumerated therein. At the time of its enactment, therefore, the Kansas Act as to confer concurrent jurisdiction only as to those crimes covered by the Major Crimes Act. As explained by the Secretary, Congress' decision to excise the word "concurrent" from the title of the Act was to clarify rather than to change its substance. Reference to modification of the Major Crimes Act was apparently dropped as unnecessary when the second sentence of the Kansas Act was added instead.

Negonsott maintains that construing the Kansas Act to confer jurisdiction on the state courts over crimes enumerated in the Major Crimes Act is inconsistent with the well-settled rule that "'statutes passed for the benefit of dependent Indian tribes...are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" 426 U.S. at 392 (quoting Alaska Pac. Fisheries, 248 U.S.

at 89. If we were to adopt the state's interpretation, Negonsott contends, the historically exclusive stewardship of the federal government over major crimes commmitted on a reservation would be eliminated, and Indians could be subject to double prosecution under both federal and state law.

We do not believe that our interpretation is inconsistent with this canon of statutory construction. The Kansas tribes, themselves, in the interest of establishing law and order on Indian lands, "expressed a wish that the jurisdiction hitherto exercised by the State courts (over both major and minor crimes) be continued." House Report at 4-5. We are unwilling to conclude that state court criminal jurisdiction conferred by Congress in response to tribal requests invades the special relationship between the tribes and the federal government. If anything, the Kansas Act reflects congressional responsiveness to Tribal needs for unified law enforcement as expressed by the Tribes

themselves.

As to any prejudice the tribes may suffer from overlapping state and federal jurisdiction, the overlap resulted from legislation requested of Congress by the Tribes. No instance of double prosecution under the scheme in Kansas has been brought to our attention and, in any event, this hypothetical burden is not peculiar to Indian lands, but applies to nearly all Americans who live under overlapping federal and state jurisdictions.[5]

In sum, we conclude that the purpose of the Kansas Act as reflected in its legislative history indicates that Congress intended to confer jurisdiction on the Kansas state courts to prosecute petitioner for aggrevated battery, a state-law crime also enumerated and defined for purposes of federal court jurisdiction in the Major Crimes Act. We therefore AFFIRM the district court's dismissal of the petition.

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5. It is arguable that doublt jeopardy would attach to successive prosecutions under the Kansas Act and the Major Crimes Act. Negonsott cites United States v. Wheeler, 435 U.S. 313 (1978), in support of his double jeopardy argument. Wheeler concerned successive prosecutions under tribal law in tribal court and under federal law in federal court. The Court held that double jeopardy did not attach because the Tribe retained inherent tribal sovereignty apart from the exercise of federal sovereignty in the subsequent prosecution. Id. at 329-30. The present case, by contrast, involves the exercise of state authority pursuant to a congressional delegation of authority under federal sovereign power. The Kansas state court is arguably an arm of the federal government when it prosecutes under the Kansas Act, thereby barring subsequent federal prosecutions in federal court. See Id. at 327 n. 26. We need not and do not decide this issue.

No. 91-5397

In The

Supreme Court of the United States

October Term, 1991

EMERY L. NEGONSOTT

Petitioner,

v.

HAROLD SAMUELS and the ATTORNEY GENERAL OF THE STATE OF KANSAS

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W. CAMPBELL
Deputy Attorney General
Kansas Judicial Center
2nd Floor
Topeka, Kansas 66612-1597
(913) 296-2215
Counsel of Record
for Respondents

12 pp

QUESTION PRESENTED

I. THE RESPONDENTS CONCUR WITH THE QUESTION PRESENTED AS STATED IN PETITIONER'S PETITION FOR CERTIORARI.

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CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The Petitioner has provided in his brief the provisions of 18 U.S.C. § 3243 and 18 U.S.C. § 1153. In addition to these statutory provisions Respondents believe that referral to the following statutory provisions would be of benefit to the Court in determining whether Certiorari would be proper since these provisions are specific criminal jurisdictional grants by Congress to states that followed the enactment of 18 U.S.C. § 3243.

62 Stat. 1161, ch. 759: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation in that State to the same extent as its courts have jurisdiction

generally over offenses committed within said State outside of any Indian reservation: Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

60 Stat. 229, ch. 279: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred on the State of North Dakota over offenses committed by or against Indians on the Devils Lake Indian Reservation in North Dakota to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of Indian reservations: Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on said reservation, nor shall anything herein contained deprive any Indian of any protection afforded by Federal laws, contract, or treaty against the taxation or alienation of any restricted property."

62 Stat. 1224, ch. 809, codified at 25 U.S.C. § 232, "The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State as defined by the laws of the State: Provided, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights."

63 Stat. 705, ch. 604: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and after January 1, 1950,

all lands located on the Agua Caliente Indian Reservation in the State of California, and the Indian residents thereof, shall be subject to the laws, civil and criminal, of the State of California, but nothing contained in this section shall be construed to authorize the alienation, encumbrance, or taxation of the lands of the reservation, or rights of inheritance, thereof whether tribally or individually owned, so long as the title to such lands is held in trust by the United States, unless such alienation, encumbrance, or taxation is specifically authorized by the Congress.

Sec. 2. Notwithstanding any other provision of law or the allotment in severalty to Indians of the Aqua Caliente Indian Reservation, and subject to the provisions of section 3 of this Act, no valid and existing permit covering lands located on the reservation, the terms of which have been fully met by the permittee, shall be terminated without the consent of the permittee prior to December 31, 1950.

Sec. 3. The city of Palm Springs in Riverside County, California with the approval of the Secretary of the Interior, and subsequent to an appropriate resolution adopted by the business committee of the Aqua Caliente Band of Mission Indians, giving approval, is hereby granted an easement not to exceed sixty feet in width for public use, and the widening and improvement of Indian Avenue along and upon section 14, township 4 south, range 4 east, San Bernardino base and meridian, in said city, said easement generally following and adjoining the east section line but within the confines of its middle portion, for the isolation and preservation of the Indian Hot Springs and the palm trees in said area, the center line of said easement shall follow an arc having a radius of one thousand two hundred seventy feet, the center and most easterly portion of the arc being one hundred forty feet east of the quarter section corner of said section 14. Said city also is granted an easement for similar purposes along and upon the westerly ten

feet of said section 14, lying within the arc. Said improvements shall be made at the expense of said city: Provided, That any holder of a valid permit covering land affected by the said widening of Indian Avenue shall be entitled to just compensation from said city of Palm Springs for the detriment suffered, taking into consideration benefits deriving from such improvement."

STATEMENT OF THE CASE

This petition results from the conviction for the crime of aggravated assault contrary to K.S.A. 21-3410, entered by the state District Court of Brown County, Kansas. The Petitioner and his victim are enrolled members of the Kickapoo Tribe in Kansas and the offense occurred on the Kickapoo Reservation located in Brown County, Kansas. While the crime for which the Petitioner was convicted is enumerated in the Major Crimes Act, 18 U.S.C. § 1153, jurisdiction for prosecution by the State of Kansas is provided by 18 U.S.C. § 3243.

Subsequent to the decision by the Tenth Circuit Court of Appeals decision affirming the denial of Habeas Corpus relief but prior to his Petition for Certiorari, Petitioner's sentence was fully discharged. Therefore Petitioner's statement at page 5 of his Petition for Writ of Certiorari that he is currently on parole is no longer correct.

PROCEDURAL HISTORY OF THE CASE

Petitioner was found guilty of aggravated assault following a jury trial in the District Court of Brown County, Kansas. The District Court set aside the conviction relying on the decision of the Kansas Supreme Court in *State of Kansas v. Mitchell*, 231 Kan. 142, 642 P.2d 981 (1982). The State of Kansas appealed the state trial court's decision to the Kansas Supreme Court which reversed the trial court in *State of Kansas v. Negonsott*, 239 Kan. 127, 716 P.2d 585 (1986). Petitioner's case was remanded by the state Supreme Court to the District Court of Brown County, Kansas for sentencing. The state District Court imposed a sentence of not less than three nor more than ten years.

The Petitioner brought suit in the United States District Court for the District of Kansas seeking Habeas Corpus relief pursuant to 42 U.S.C. § 2254. *Negonsott v. Harold Samuels and the Attorney General of the State of Kansas*, case No. 88-3049-S (D.Kan. September 22, 1988). Habeas Corpus relief was denied by the United States District Court on September 22, 1988. (Id.). The Tenth Circuit Court of Appeals affirmed the United States District Courts' denial of Habeas relief. *Negonsott v. Harold Samuels and the Attorney General of the State of Kansas*, case No. 88-2666 (10th Cir.).

The Kansas Supreme Court in *State v. Negonsott*, supra, the United States District Court for the District of Kansas and the Tenth Circuit Court of Appeals all held that the State of Kansas has been given jurisdiction to prosecute the Petitioner pursuant to 18 U.S.C. § 3243.

REASONS FOR GRANTING THE PETITION

Respondents concur with the position of the Petitioner that issuance of a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit would be beneficial for the lower Courts of the Federal and State judiciary in this matter of state application of the jurisdiction provided by 18 U.S.C. § 3243 and the statutes that were modeled upon it. However, due to the Respondents' obligation to the Court, it must be pointed out that the petitioner has been discharged from the sentence imposed as a result of the conviction that gives rise to his Petition for Certiorari review of his appeal denying federal Habeas Corpus relief pursuant to 42 U.S.C. § 2254.

The issue of whether a state has the jurisdiction to prosecute American Indians that commit crimes on Reservations located within the boundaries of a state pursuant

to Congressional grants of authority despite the crime also being enumerated in the Major Crimes Act found at 18 U.S.C. § 1153 is of great import to the Tribes, the States in which those Reservations are located and the Federal Government. The statute that gives rise to the State of Kansas' jurisdiction over offense committed on Reservations located within its boundaries, 18 U.S.C. § 3243, was the model for Congressional grants of criminal jurisdiction to the State of Iowa, 62 Stat. 1161, ch. 759; North Dakota, 60 Stat. 229, ch. 279; New York, 62 Stat. 1224, ch. 809, codified at 25 U.S.C. § 232; and California, 63 Stat. 705, ch. 604. Litigation of the Congressional grant of criminal jurisdiction to the State of Iowa has resulted in a decision by the Eighth Circuit Court of Appeals in *Youngbear v. Brewer*, 549 F.2d 74 (8th Cir., 1977) which is contrary to the holding of the Tenth Circuit in the present case.

A decision by this Court would determine the effect of the specific Congressional grants of criminal jurisdiction for these other states as well as Kansas and resolve the conflict that currently exists between the Tenth Circuit and the Eighth Circuit Courts of Appeal. In the case of the State of Iowa, a decision by this Court would probably be the only avenue available for Iowa to resume criminal prosecutions of crimes committed on Reservations within that state since it is bound by the decision in *Youngbear*, supra. It is a reality that decisions involving criminal jurisdiction that are contrary to the state can rarely be overruled since the factual basis for a subsequent determination are created by the state only when it acts contrary to existing case law.

A decision by this Court would provide guidance to the law enforcement agencies of the States that have been given Congressional grants of criminal jurisdiction, assist the federal law enforcement agencies in coordinating their resources with the States, and inform the members of the

Tribe which jurisdiction they may rely on for police protection.

While the Respondents agree with the Petitioner that the issue of whether the State of Kansas may prosecute crimes committed on Reservations pursuant to U.S.C. § 3243 when the crime is also enumerated in 18 U.S.C. § 1153 is worthy of Certiorari review by this Court, Respondents must point out that the Petitioner in the present case is no longer in custody within the meaning of 28 U.S.C. § 2254. The discharge of the Petitioner's state sentence of course negates the impact of any decision of this Court to the Petitioner. The Respondents are aware of this Court's decisions in *Carafas v. LaVallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968) and *Maleng v. Cook*, 490 U.S. 1032, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). In *Carafas* and *Maleng* this Court held that Habeas Corpus relief was available if the Petitioner was in custody at the time that his petition was filed with the Federal Court. In the present case the Respondents concede that Petitioner was in the custody of the State of Kansas at the time he petitioned the United States District Court for Habeas relief and brought his appeal before the Tenth Circuit Court of Appeals.

The Respondents' position that Certiorari would be proper in this case should not be viewed by the Court that Respondents do not believe that the Tenth Circuit's decision was in error. The decision of the Tenth Circuit properly set out the interplay between the jurisdictional grant of 18 U.S.C. § 3243 and the Major Crimes Act found at 18 U.S.C. § 1153 and the legislative history of 18 U.S.C. § 3243.

IN CONCLUSION, Respondents believe that issuance of the Writ of Certiorari would be of benefit in the resolution of the contrary opinions of the Eighth and Tenth

Circuit Courts of Appeals regarding the authority of a state to prosecute criminal offenses pursuant to a specific grant by Congress.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas
JOHN W. CAMPBELL
Deputy Attorney General
Kansas Judicial Center
Second Floor
Topeka, Kansas 66612-1597
(913) 296-2215
Counsel of Record
for Respondents

No. 91-5397

In the Supreme Court of the United States

OCTOBER TERM, 1991

EMERY L. NEGONSOTT, PETITIONER

v.

HAROLD SAMUELS, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

EDWARD J. SHAWAKER
KATHERINE L. ADAMS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether 18 U.S.C. 3243 confers criminal jurisdiction on the State of Kansas to prosecute petitioner for an offense, committed on an Indian reservation, that would otherwise be within exclusive federal jurisdiction under the Major Crimes Act, 18 U.S.C. 1153.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Emery Negonsott is an enrolled member of the Kickapoo Tribe in Kansas, a federally recognized Indian Tribe. In 1985, he was arrested by the Brown County Sheriff, a state law enforcement official, in connection with the shooting of another Indian on the Kickapoo Reservation. Petitioner was subsequently convicted in Kansas state court of aggravated battery. The Supreme Court of Kansas affirmed, holding that the State had criminal jurisdiction over the offense. *State* v. *Nioce*, 716 P.2d 585 (Kan. 1986) (Pet. App. 21-34).

2. Petitioner then filed the present habeas corpus action in the United States District Court for the District of Kansas, seeking a writ of habeas corpus. He claimed that 18 U.S.C. 3243, which grants the State of Kansas criminal jurisdiction over crimes by or against Indians committed on Indian reservations in Kansas, does not extend to aggravated battery. In petitioner's view, that crime, by virtue of being encompassed by the Major Crimes Act, 18 U.S.C. 1153, remains subject to exclusive federal jurisdiction.

The district court rejected petitioner's claim. In the court's view, 18 U.S.C. 3243 grants Kansas jurisdiction concurrent to that of the United States with respect to all crimes, even those covered by the Major Crimes Act. Pet. App. 35-43. The Court of Appeals for the Tenth Circuit affirmed on the same ground. *Negonsott* v. *Samuels*, 933 F.2d 818 (1991) (Pet. App. 44-64). This petition for certiorari, in which respondent has acquiesced, followed.

DISCUSSION

In our view, the court of appeals' holding is clearly correct. The pertinent federal statute—18 U.S.C. 3243—confers criminal jurisdiction on the State of Kansas to prosecute Indians for aggravated battery and other major crimes committed on Indian reservations in Kansas. The Eighth Circuit, however, has reached the contrary conclusion under a virtually identical statute that confers criminal jurisdiction on the State of Iowa over the Sac and Fox Indian Reservation in that State. A third identically worded statute confers criminal jurisdiction on North Dakota over the Devils Lake Sioux Reservation. Resolution of the basic question in this case—whether federal jurisdiction over such crimes is exclusive or whether the States enjoy concurrent jurisdiction—is of considerable practical importance to both state and federal law enforcement authorities in those States. In view of its importance, and because the Eighth and Tenth Circuits have reached conflicting conclusions on the question, we agree with both petitioner and respondent that review is warranted.[1]

1. a. The generally applicable framework governing criminal jurisdiction on Indian reservations is well established. Under 18 U.S.C. 1152, crimes committed by or against Indians in Indian country are subject to federal jurisdiction. However, the second paragraph of Section 1152 expressly excludes offenses committed by one Indian against the person or property of another.[2] Such offenses between Indians are typically subject to the exclusive jurisdiction of the Tribe concerned, except for offenses covered by the Major Crimes Act, 18 U.S.C. 1153. The latter offenses are subject to federal as well as tribal jurisdiction. See *Duro* v. *Reina*, 495 U.S. 676, 696-697 (1990).

This Court has held that federal jurisdiction over those offenses committed by Indians that are covered by 18 U.S.C. 1153 (the Major Crimes Act) is exclu-

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[1] Since filing his petition for a writ of habeas corpus, petitioner has been released from custody and his sentence has been discharged. The petition is not moot, however, because petitioner was in custody when the petition was filed and he continues to suffer collateral consequences from his conviction. *Carafas* v. *LaVallee*, 391 U.S. 234, 237-238 (1968); *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985) (collateral consequences include possible use of conviction to impeach future testimony and to prosecute petitioner as multiple offender).

[2] Offenses committed by one non-Indian against another non-Indian are implicitly excluded from 18 U.S.C. 1152 under *United States* v. *McBratney*, 104 U.S. 621 (1882). Those offenses are instead subject to state jurisdiction.

sive of state jurisdiction. *United States* v. *John*, 437 U.S. 634, 651 (1978); see also *Seymour* v. *Superintendent*, 368 U.S. 351, 359 (1962). The Court has also repeatedly stated (albeit in dictum) that federal jurisdiction over other crimes under 18 U.S.C. 1152 likewise is exclusive of state jurisdiction. *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *Williams* v. *Lee*, 358 U.S. 217, 220 (1959); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979). A number of state courts have likewise so held. See *State* v. *Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989); *Arquette* v. *Schneckloth*, 351 P.2d 921 (Wash. 1960); *In re Application of Denetclaw*, 320 P.2d 697 (Ariz. 1958); *State* v. *Kuntz*, 66 N.W.2d 531 (N.D. 1954); see also *State* v. *Warner*, 379 P.2d 66, 68-69 (N.M 1963) (dictum); *State* v. *Jackson*, 16 N.W.2d 752, 754 (Minn. 1944) (dictum); 30 Op. Or. Att'y Gen. 11 (1960).[3]

Congress may, of course, alter these jurisdictional arrangements. Indeed, Congress has done so. Public Law 280 is the most familiar example. That statute automatically conferred on certain States jurisdiction over offenses involving Indians in Indian country. The statute also authorized other States to assume such jurisdiction. See *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. at 471-474.

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[3] In our amicus brief urging denial of the petition for certiorari in *Arizona* v. *Flint*, 492 U.S. 911 (1989), we took the position that federal jurisdiction under 18 U.S.C. 1152 is exclusive. We relied, *inter alia*, on the decisions cited in the text; Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588) and its legislative history; and the background of special statutes (including 18 U.S.C. 3243, at issue in this case) that confer criminal jurisdiction on particular States.

Prior to Public Law 280's enactment, Congress passed a series of special statutes granting particular States jurisdiction over some or all Indian country within their respective borders. This case involves one such statute, 18 U.S.C. 3243. Enacted in 1940, the statute confers plenary criminal jurisdiction on the State of Kansas over the four Indian reservations within its borders. Act of June 8, 1940, ch. 276, 54 Stat. 249. We turn now to examine that statute.

b. Section 3243 provides in full:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The language of the first sentence of Section 3243 unambiguously confers criminal jurisdiction on Kansas over *all* offenses (as defined by state law) committed by or against Indians on Indian reservations, whether or not the offenses are otherwise subject to 18 U.S.C. 1152 or 1153 or to the jurisdiction of the tribe concerned. See Pet. App. 50-51.

Petitioner does not dispute that the first sentence of 18 U.S.C. 3243, standing alone, subjects him to state jurisdiction. He contends (Pet. 7-8), however, that insofar as his offense is concerned, the jurisdiction granted by the first sentence is taken away by the second. The second sentence preserves federal court jurisdiction "over offenses defined by the laws of the

United States committed by or against Indians on Indian reservations." Petitioner argues that because the Major Crimes Act includes the crime (aggravated battery) of which he was convicted [4]—and that because federal jurisdiction under that Act ordinarily is exclusive—the preservation of federal jurisdiction in the second sentence of Section 3243 must be read to retain the "exclusive" aspect of that jurisdiction under the Major Crimes Act. In petitioner's view, the first sentence of Section 3243 can be read according to its plain meaning only if Congress impliedly "repealed" the Major Crimes Act. See Pet. 19-20. Petitioner is wrong; he misapprehends the import of both 18 U.S.C. 3243 and the Major Crimes Act.

The text of Section 3243 as a whole demonstrates that Congress granted Kansas *complete* criminal jurisdiction, over both major and minor crimes. Although this interpretation eliminates the otherwise exclusive nature of federal jurisdiction under 18 U.S.C. 1153 over major crimes committed by Indians in Kansas, that was precisely the purpose of the first sentence of Section 3243. The second sentence did no more than preserve the subject matter jurisdiction of federal courts over crimes defined by federal law. It does not suggest that this jurisdiction, as so pre-

[4] The Major Crimes Act does not specifically mention battery, aggravated or otherwise. It does, however, include among the listed offenses "assault to commit murder, assault with a dangerous weapon, [and] assault resulting in serious bodily injury." 18 U.S.C. 1153. The Kansas statute that petitioner was convicted of violating defines aggravated battery, in part, as "the unlawful touching or application of force" to another person "which either (a) [i]nflicts great bodily harm upon him; or * * * (c) [i]s done with a deadly weapon, or in any manner whereby great bodily harm * ** can be inflicted." Kan. Stat. Ann. § 21-3414 (1991).

served, is exclusive of state jurisdiction. Recognition of jurisdiction in the state courts over crimes under *state* law does not "deprive" the "courts of the United States" of their "jurisdiction" over "offenses defined by the laws of the United States." [5]

Moreover, a construction of the second sentence of Section 3243 that rendered federal jurisdiction exclusive wherever conduct is made criminal by federal law would conflict with the first sentence's unqualified grant of jurisdiction to Kansas. In contrast, construing the second sentence to preserve *concurrent* federal authority over the same general subject matter best comports with the canon of construction that full effect be given to all of the statute's language, see *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979)—a familiar canon that this Court has applied to statutes affecting Indians. See *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 239 (1985).

Nor does this interpretation work an "implied repeal" of the Major Crimes Act. In the first place, there is nothing "implied" about the effect of 18 U.S.C. 3243 in this setting; state jurisdiction follows from the express terms of the first sentence of Section 3243. Moreover, it is not the Major Crimes Act that precludes the exercise of state jurisdiction over conduct by Indians that constitutes a federal crime under that Act. The preclusion flows, instead, from the general principle that States have no inherent jurisdiction over Indians in Indian country, *United States* v. *John*, 437 U.S. at 651-653; *Fisher* v. *District*

[5] Indeed, the subject matter jurisdiction of the federal courts over federal prosecutions under the Major Crimes Act or 18 U.S.C. 1152 remains *exclusive* under 18 U.S.C. 3231.

Court, 424 U.S. 382 (1976), and may exercise such jurisdiction only where (as here) there is a clear grant of authority by Congress. *Williams* v. *Lee*, 358 U.S. at 221 ("when Congress has wished the States to exercise [criminal and civil adjudicatory jurisdiction] it has expressly granted [it to] them"); *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976).[6] By virtue of that settled principle, Kansas would have been without jurisdiction (prior to enactment of 18 U.S.C. 3243) to prosecute an Indian for a major crime committed on an Indian reservation within its borders even if hte Major Crimes Act had never been enacted. *United States* v. *Kagama*, 118 U.S. 375, 384 (1886); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); cf. *Ex parte Crow Dog*, 109 U.S. 556 (1883); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-756 (1867).

Finally, just as jurisdiction under the Major Crimes Act ordinarily is exclusive of state jurisdiction, federal jurisdiction under 18 U.S.C. 1152 over other crimes committed by or against Indians in Indian country is also exclusive. See p. 4, *supra*. Accordingly, under petitioner's view (that the second sentence of Section 3243 renders federal jurisdiction exclusive wherever it exists), the first sentence would actually confer jurisdiction on Kansas only over those offenses that are not also crimes defined by federal law.[7] In other words, Section 3243 would confer no

[6] Congress enacted Section 3243 specifically to grant Kansas some measure of criminal jurisdiction. The question is whether that grant includes major crimes as defined by federal law. That issue is quite different from the question in *United States* v. *John*, *supra*, where the State was not acting pursuant to a congressional grant of criminal jurisdiction.

[7] Under petitioner's view, the only offenses over which the State obtained jurisdiction under 18 U.S.C. 3243 would be those non-major crimes that are committed by one Indian against another (which, by virtue of the second paragraph of 18 U.S.C. 1152, are ordinarily subject to the exclusive jurisdiction of the tribe concerned)—and, perhaps, those offenses defined by state law and assimilated into federal law by 18 U.S.C. 1152 and the Assimilative Crimes Act, 18 U.S.C. 13. The Tenth Circuit has held that assimilated state crimes are not "offenses defined by the laws of the United States" within the meaning of the proviso to 18 U.S.C. 3243. See *Iowa Tribe of Indians* v. *Kansas*, 787 F.2d 1434, 1439-1440 & n.3 (10th Cir. 1986); cf. *United States* v. *Bear*, 932 F.2d 1279, 1281 (9th Cir. 1990). Under that view, state jurisdiction over such offenses is exclusive, and the second sentence of Section 3243 preserves concurrent federal jurisdiction under 18 U.S.C. 1152 only over offenses that are independently defined by federal law.

concurrent jurisdiction at all. That view is contrary to the explicit text of the Act.

c. As shown above, Section 3243 by its terms confers complete criminal jurisdiction on Kansas. We therefore would not ordinarily find it necessary to discuss, much less rely on, the statute's legislative history. See *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989). However, because petitioner argues that Section 3243's legislative history supports his interpretation of the statute, we think it is appropriate to respond.

In our view, the legislative history of Section 3243 clearly confirms that Congress intended to establish a regime of concurrent jurisdiction, not to preserve exclusive federal jurisdiction over conduct made criminal by federal law. The history shows this: (a) prior to enactment of Section 3243, Kansas as a practical matter exercised jurisdiction over *all* crimes committed by or against Indians, regardless of whether they were otherwise subject to federal jurisdiction; (b) the Indians in Kansas did not object to

this regime, and in fact sought enactment of Section 3243 to clarify the legality of the State's exercise of jurisdiction; and (c) Section 3243 was intended to confer on Kansas complete jurisdiction over all crimes (as defined by state law) by or against Indians, while retaining jurisdiction in federal courts over crimes defined by federal law. See H.R. Rep. No. 1999, 76th Cong., 3d Sess. (1940) (House Report); S. Rep. No. 1523, 76th Cong., 3d Sess. (1940) (Senate Report).

Both the House and Senate Reports consist almost exclusively of a letter and memorandum from Acting Secretary of the Interior Burlew commenting on the proposal to confer jurisdiction on Kansas and the original version of the bill intended to accomplish that result. The Acting Secretary offered an alternative version of the bill that took account of views he expressed in the letter and memorandum, and it was this version that Congress enacted into law as Section 3243. Thus, the views of the Acting Secretary, who headed the agency responsible for administering Indian Affairs, are of considerable relevance in construing Section 3243, *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979), especially since the responsible congressional committees adopted his views and proposal in their reports.

The letter and memorandum explain that Kansas then exercised jurisdiction over all crimes by or against Indians. The Acting Secretary expressed the view that without the exercise of jurisdiction by the State, law enforcement on Indian reservations in Kansas would have been inadequate, because existing federal criminal statutes "le[ft] some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts," and because "[i]n the case of the four Kansas reservations * * * no tribal

courts [had] existed for many years." House Report at 2; Senate Report at 2. As a practical matter, therefore, "offenses committed on these reservations and involving Indians have been prosecuted in the State courts, *even where the criminal act charged constituted one of the major offenses listed in* [*the Major Crimes Act*]." House Report at 4 (emphasis added); Senate Report at 3 (emphasis added).

The bill was proposed because questions had been raised about "the authority of the State courts to proceed in these cases," House Report at 4; Senate Report at 3, and the legislative history makes clear that it was intended to ratify the then-existing regime of *de facto* state jurisdiction. Indeed, according to the Acting Secretary, the Indians themselves "[did] not desire reestablishment of the tribal courts, but * * * expressed a wish that the jurisdiction hitherto exercised by the State courts be continued." *Ibid.*[8] Inasmuch as the State had exercised jurisdiction over *all* offenses, including those defined as major crimes under federal law, both the Executive and the Legislative Branches plainly understood that the bill would confer jurisdiction over all offenses defined by Kansas law, whether or not those offenses were subject to federal jurisdiction as well. The Acting Secretary of the Interior made this point explicitly: "In short, the

[8] The Acting Secretary further noted that state prosecutions—even for major crimes—"were had with the approval of the tribes concerned, and the exercise of criminal jurisdiction by the State courts was to their general satisfaction." House Report at 4; Senate Report at 3. Hence, the construction we urge is not in tension with the canon requiring liberal construction of statutes in favor of Indians. See, *e.g.*, *Bryan* v. *Itasca County*, 426 U.S. at 392; *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 79 (1918); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912).

enactment of [Section 3243] will merely confirm a relationship which the State has willingly assumed, which the Indians have willingly accepted, and which has produced successful results, over a considerable period of years." House Report at 5; Senate Report at 4.

Petitioner contends that an amendment of the bill demonstrates that Congress intended that federal jurisdiction over offenses covered by the Major Crimes Act would be exclusive. As originally proposed, the bill provided for "relinquish[ment]" of "concurrent jurisdiction" to Kansas, and specifically stated that the Major Crimes Act, 18 U.S.C. 548 (1934)—as well as 25 U.S.C. 217 and 218 (1934), the predecessors of 18 U.S.C. 1152—would be "modified accordingly." See 86 Cong. Rec. 5596 (1940). Subsequently, each House adopted a substitute version that contained substantial revisions, including deletion of both the reference to "concurrent" jurisdiction and the explicit modification of the Major Crimes Act. In light of those revisions, petitioner argues that Section 3243, as enacted, must be construed as *not* conferring concurrent jurisdiction and as *not* modifying the exclusive aspect of federal jurisdiction under the Major Crimes Act. Cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987).

Rather than buttressing petitioner's position, however, the amendment supports our reading of Section 3243. Petitioner fails to point out that the substitute version was proposed by the Acting Secretary in order to express more accurately the legal situation as it then existed and as it was "intended to be created." House Report at 3; Senate Report at 2. In particular, because federal courts apparently had exercised jurisdiction only over major crimes, the Acting Secretary thought that it was inaccurate to describe the bill as generally "relinquishing" "concurrent" jurisdiction to Kansas; rather, in his view, it conferred complete criminal jurisdiction on the State, whether or not the federal government would also have jurisdiction over the particular offense. He explained:

> The bill proposes to relinquish concurrent jurisdiction to the State of Kansas, intending thereby *to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law.* However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, *but a case of conferring upon the State complete jurisdiction*, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law.

House Report at 3 (emphasis added); accord, Senate Report at 2. The substitute bill the Acting Secretary proposed (and Congress enacted) was intended to make clear that Section 3243 would confer *more* than whatever jurisdiction happened to be concurrent with that of the United States, not to narrow its scope. See Pet. App. 60-61; *Iowa Tribe of Indians* v. *Kansas*, 787 F.2d at 1439-1440. As the court of appeals correctly noted, the "decision to excise the word 'concurrent' * * * was to clarify rather than to change [the] substance" of what is now 18 U.S.C. 3243. Pet. App. 61.[9]

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[9] The Acting Secretary did not explain why his substitute lacked a provision stating that the Major Crimes Act and what is now 18 U.S.C. 1152 were "modified accordingly." At least two explanations are possible. First, because the sub-

The Acting Secretary's explanation also makes plain that the intent was only to ensure that "prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable." House Report at 5; Senate Report at 4. The obvious corollary was that the State would have jurisdiction in *all* cases.

Finally, petitioner seeks support for his view in a letter from Representative Lambertson of Kansas to the House Committee on Indian Affairs recommending enactment of the proposed bill. See House Report at 1-2. In that letter, Representative Lambertson noted that "[t]he Government here relinquishes to the State full jurisdiction over the Indians

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stitu[illegible] version made clear that the State would have complete jurisdiction and that the United States would retain whatever jurisdiction it then had over offenses committed by or against Indians (under the Major Crimes Act or what is now 18 U.S.C. 1152), there was no need to reiterate what the effect on the latter statutory provisions would be. See Pet. App. 61 ("Reference to modification of the Major Crimes Act was apparently dropped as unnecessary when the second sentence of the Kansas Act was added instead."). Second, the "exclusive" nature of federal jurisdiction over offenses covered by the Major Crimes Act and what is now 18 U.S.C. 1152 derived not from those provisions standing alone, but from more general principles of Indian law that rendered state law inapplicable to matters involving Indians in Indian country. The express conferral of criminal jurisdiction on Kansas in the first sentence of Section 3243 was sufficient to displace those general principles of preemption, and there accordingly was no need to "modify" the Major Crimes Act or the predecessors of 18 U.S.C. 1152. In any event, any negative inference that might be drawn from the mere absence of an "express" modification provision is wholly insufficient to overcome the clear import of the all-encompassing statutory text and the legislative history.

for small offenses." *Id.* at 2. The negative implication, petitioner argues, is that Congress intended to confer *no* jurisdiction over crimes included in the Major Crimes Act. This is baseless. If anything, the fact that Representative Lambertson understood Congress to "relinquish" to Kansas "full" jurisdiction over "small" offenses—with the implication that there would be no federal jurisdiction over those offenses—suggests that he believed the State would acquire only partial (*i.e.*, concurrent) jurisdiction over major crimes. See Pet. App. 57-58.[10]

2. Eight years after enacting Section 3243, Congress granted the State of Iowa criminal jurisdiction over crimes committed by or against Indians on the Sac and Fox Indian Reservation in Iowa. See Act of June 30, 1948, ch. 759, 62 Stat. 1161. The Iowa Act is identical to Section 3243 in all relevant respects,[11]

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[10] In stating that Kansas acquired "full" jurisdiction over "small offenses," Representative Lambertson may have been referring to non-major crimes committed by one Indian against another. Because such crimes are excluded from federal jurisdiction under 18 U.S.C. 1152 by the second paragraph of that provision—and because the tribes concerned did not have tribal courts that could exercise jurisdiction over such crimes—Kansas acquired "full" jurisdiction over those crimes under Section 3243.

[11] The Iowa Act provides:

> [J]urisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation in that State to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of any Indian reservation: *Provided, however*, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws

and it was expressly patterned after Section 3243. See H.R. Rep. No. 2356, 80th Cong., 2d Sess. 3 (1948). We therefore see no reason why the identical language in the Iowa Act and Section 3243 should be interpreted differently. The Eighth Circuit has concluded, however, that the proviso to the Iowa Act preserves exclusive federal jurisdiction over offenses covered by the Major Crimes Act. See *Youngbear* v. *Brewer*, 549 F.2d 74 (8th Cir. 1977). In interpreting the Iowa Act, the Eighth Circuit, adopting the analysis of the district court in that case, relied on the legislative history of Section 3243, which it believed (largely for the reasons urged by petitioner here) supported a finding of exclusive federal jurisdiction over major crimes. See 549 F.2d at 76; *Youngbear* v. *Brewer*, 415 F. Supp. 807, 812-813 (N.D. Iowa 1976).[12] As we have explained, that reading of Section 3243's legislative history is erroneous.

The interpretation of yet a third criminal statute is implicated here as well. In 1946, Congress extended to the State of North Dakota jurisdiction over crimes committed on the Devils Lake Sioux Reservation in language identical in all relevant respects to

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of the United States committed by or against Indians on Indian reservations.

62 Stat. 1161.

[12] The Iowa Supreme Court recently adopted the Eighth Circuit's interpretation of the Iowa Act. See *State* v. *Bear*, 452 N.W.2d 430 (Iowa 1990). That court originally took the view that the Iowa Act gave Iowa *exclusive* jurisdiction over non-major crimes, and *concurrent* jurisdiction over major crimes. See *State* v. *Youngbear*, 229 N.W.2d 728 (Iowa), cert. denied, 423 U.S. 1018 (1975). "Upon reexamination of the applicable statutes," however, the Iowa Supreme Court decided that the Eighth Circuit's *Youngbear* interpretation of the Iowa Act is correct. *State* v. *Bear*, 452 N.W.2d at 433.

that of Section 3243 (and the Iowa Act). See Act of May 31, 1946, ch. 279, 60 Stat. 229; S. Rep. No. 997, 79th Cong., 2d Sess. 2 (1946); H.R. Rep. No. 2032, 79th Cong., 2d Sess. 2 (1946). Application of the North Dakota Act to crimes otherwise within exclusive federal jurisdiction has not yet been definitively determined by any court, state or federal. See *State* v. *Hook*, 476 N.W.2d 565, 571 n.6 (N.D. 1991) (reserving the question of state jurisdiction over major crimes). If the question were raised in federal court, the Eighth Circuit's *Youngbear* holding with respect to the Iowa Act presumably would control the interpretation of the North Dakota Act, although the state courts of North Dakota would be free to disagree. Compare *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984) (certiorari granted because federal and state courts rendered conflicting interpretations of a statute affecting state and federal criminal jurisdiction over the Cheyenne River Sioux Reservation in South Dakota.)[13]

The very existence of separate statutes conferring jurisdiction on particular States over Indian reserva-

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[13] Respondent cites two additional federal statutes granting criminal jurisdiction to New York and California that are similar to the Kansas Act. See Act of Oct. 5, 1949, ch. 604, 63 Stat. 705 (California); Act of July 2, 1948, ch. 809, 62 Stat. 1224, codified at 25 U.S.C. 232 (New York). The California Act is no longer in force; in 1953, Public Law 280 granted California complete criminal jurisdiction over all Indian country located within its borders. See 18 U.S.C. 1162. Moreover, both the California and New York Acts differ in one significant respect from those granting jurisdiction to Kansas, Iowa and North Dakota: they lack a proviso expressly preserving federal jurisdiction. The Second Circuit nonetheless has held that the United States retains concurrent criminal jurisdiction over Indian reservations in New York. *United States* v. *Cook*, 922 F.2d 1026, 1032-1033 (2d Cir.), cert. denied, 111 S. Ct. 2235 (1991).

tions within their borders indicates that this is not an area in which congressional policy requires a uniform nationwide rule. Accordingly, the fact that the Eighth and Tenth Circuits have reached different results under statutes conferring criminal jurisdiction on different States does not in itself mean that the Court is presented with the sort of circuit conflict that warrants review.

We nonetheless agree with petitioner and respondent that review is warranted. The Iowa Act is identical to and was explicitly patterned after the Kansas Act; the Eighth Circuit in *Youngbear* relied on the legislative history of the latter in construing the former; and the Tenth Circuit below in turn disagreed with the Eighth Circuit's reasoning in *Youngbear*. This case therefore presents a square conflict regarding the interpretation of identical statutory text.

Moreover, resolution of the issue of statutory construction is a matter of some importance. The differing interpretations of identical statutory language create doubts concerning the jurisdiction of three States over crimes committed by or against Indians on reservations within their borders. Law enforcement responsibilities of federal authorities within those States is correspondingly uncertain. Affirmance of the Tenth Circuit's judgment by this Court—which we believe is the proper disposition—would necessarily repudiate the Eighth Circuit's holding in *Youngbear*. The result would be to restore to Iowa the jurisdiction that Congress plainly intended it to enjoy, and to remove any doubts about North Dakota's jurisdiction. If, however, we are wrong on the merits (and if federal authorities therefore have exclusive responsibility for prosecuting major and other crimes involving Indians on the affected reservations in all three States), that responsibility should be made

clear, so that federal and state authorities may allocate their investigative and prosecutorial resources accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

EDWARD J. SHAWAKER
KATHERINE L. ADAMS
Attorneys

JUNE 1992

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No. 91-5397

In The

Supreme Court of the United States

October Term, 1992

EMERY L. NEGONSOTT,

Petitioner,

v.

HAROLD SAMUELS, WARDEN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

PAMELA S. THOMPSON*
4400 Elkhorn Boulevard
#117
Sacramento, California
95842
(916) 334-9155
Counsel for Petitioner

ROBERT T. STEPHAN*
Attorney General
Kansas Judicial Center
2nd Floor
Topeka, Kansas 66612-1597
(913) 296-2215
Counsel for Respondent

*Counsel of Record

Petition For Writ Of Certiorari Filed August 5, 1991
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Supreme Court of Kansas.

STATE of Kansas, Appellant,

v.

Bennie NIOCE, Appellee,

and

STATE of Kansas, Appellant,

v.

Emery L. NEGONSOTT, Appellee.

Nos. 58328, 58530.

March 28, 1986.

Syllabus by the Court

Congress' intent in enacting 18 U.S.C. § 3243 (1982) was to grant the State of Kansas jurisdiction over all crimes committed by or against Indians on Indian reservations located in Kansas. The United States retains concurrent jurisdiction with Kansas over crimes listed in the Federal Major Crimes Act. 18 U.S.C. § 1153 (1982). (Overruling *State v. Mitchell,* 231 Kan. 144, 642 P.2d 981 [1982]).

HERD, Justice:

These consolidated actions raise the issue of whether the State of Kansas has jurisdiction over criminal offenses committed by or against Indians on Indian reservations located within this state. While the facts are not essential for resolution of this issue, they are briefly stated as follows.

Appellee Bennie Nioce is an American Indian who allegedly committed aggravated battery upon another

American Indian while on the Pottawatomie County Indian Reservation in Jackson County, Kansas. The Jackson County District Court, relying on our holding in *State v. Mitchell*, 231 Kan. 144, 642 P.2d 981 (1982), dismissed the charges against Nioce. Identical charges were subsequently reinstated against Nioce, based upon a recent decision of the Federal District Court of Kansas, *Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas*, No. 83-4304 (D.Kan.1984). The federal court concluded *Mitchell* was wrongly decided. The Kansas trial court, however, once again dismissed the charges against Nioce, following *Mitchell*.

Appellee, Emery Negonsott is a Kickapoo Indian who is charged with aggravated battery for the shooting of anotner Kickapoo Indian. The shooting occurred within the territorial confines of the Kickapoo Indian Nation Reservation, located in Brown County, Kansas. He was convicted by jury of the crime charged but the district court, relying on *Mitchell*, subsequently set aside the conviction for lack of jurisdiction.

The State appeals, urging the court to reconsider its decision in *Mitchell* and give Kansas jurisdiction over all crimes committed by or against Indians on Indian reservations in Kansas.

The primary issue is whether the State of Kansas has jurisdiction to try the appellants for the crime of aggravated battery. Resolution of this issue depends upon our interpretation of 18 U.S.C. § 3243 (1982):

> "Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> "This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

The first provision of this statute is clear and appears to confer jurisdiction on the State of Kansas over all offenses committed by or against Indians on Indian reservations within the State. However, the second paragraph renders the statute ambiguous as it preserves federal jurisdiction over "offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

Appellees argue the Federal Major Crimes Act, codified at 18 U.S.C. § 1153 (1982), grants exclusive federal jurisdiction over Indian offenses. That statute provides in part:

> "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject

> to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

We first had occasion to interpret 18 U.S.C. § 3243 in *State v. Mitchell*, 231 Kan. 144, 642 P.2d 981 (1982). There, the defendant was charged with murder in the second degree. Both the defendant and the victim were "Indians" and the offenses occurred within "Indian country" as those terms are defined in 18 U.S.C. § 1151 *et seq.* (1982). The defendant argued 18 U.S.C. § 1153 granted exclusive federal jurisdiction over Indian offenses, while the State contended 18 U.S.C. § 3243 gave Kansas concurrent jurisdiction. After examining the legislative history of the statutes in question, we determined that Congress, in enacting 18 U.S.C. § 3243, intended to retain exclusive jurisdiction over the crimes specifically enumerated in 18 U.S.C. § 1153, including murder. Therefore, we held the State acted beyond the scope of its jurisdictional authority in trying the defendant for murder.

The court, in so holding, relied primarily upon the case of *Youngbear v. Brewer*, 415 F.Supp. 807 (N.D.Iowa 1976), *aff'd* 549 F.2d 74 (8th Cir.1977). There, the federal court interpreted an identical grant of jurisdiction to Iowa, and held that Congress intended to preserve exclusive federal jurisdiction over the major crimes.

This court in *Mitchell* and the federal court in *Youngbear* cited the legislative history of 18 U.S.C. § 3243 as support for their interpretation of the statute. The original draft of the bill conferring jurisdiction on the State of Kansas specifically provided that *concurrent* jurisdiction was relinquished to the State and further provided that

the Federal Major Crimes Act be modified accordingly. 86 Cong. Rec. 5596, 76th Cong. 3d Sess. (May 6, 1940). A subsequent committee amendment, however, rejected the references to concurrent jurisdiction and modification of the Major Crimes Act. We concluded, as did the *Youngbear* court, that deletion of this language clearly indicated Congress' intent to preserve exclusive federal jurisdiction over the major crimes and to give Kansas jurisdiction only over minor offenses. *State v. Mitchell*, 231 Kan. at 150, 642 P.2d 981. See also *Youngbear v. Brewer*, 415 F.Supp. at 813.

The State now urges us to reexamine *Mitchell* in light of the Federal District Court of Kansas decision in *Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas*, No. 83-4304 (D.Kan.1984).

In *Iowa Tribe*, the plaintiff sought a declaratory judgment that 18 U.S.C. § 3243 does not make Kansas gambling laws prohibiting the sale of "pull-tab cards" applicable to such activities on the Iowa Indian reservation. The State counterclaimed, seeking a declaration that 18 U.S.C. § 3243 grants jurisdiction over Indians for acts occurring on the reservation which are recognized as crimes under Kansas law. The federal district court concluded that 18 U.S.C. § 3243 confers complete (but not exclusive) criminal jurisdiction upon the State of Kansas. In reaching its decision, the district court considered additional relevant legislative history to 18 U.S.C. § 3243 not considered by this court in *Mitchell* or the federal district court in *Youngbear*.

Specifically, the court considered the report of E.K. Burlew, Acting Secretary of the Interior, to Representative

Will Rogers, Chairman of the House Committee on Indian Affairs, and Senator Elmer Thomas, Chairman of the Senate Committee on Indian Affairs. This report consisted of a letter and memorandum discussing the purpose and effect of the proposed legislation.

As noted by the federal Court in *Iowa Tribe*, Burlew's letter indicates the purpose of the legislation was to allow Kansas courts to continue punishing offenses committed on Indian reservations, including offenses covered by federal statutes. The relevant portion of Burlew's letter follows:

> With the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, *including those covered by Federal statutes*. The legality of this practice being questioned recently, the tribal councils of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance by a transfer of jurisdiction to the State." (Emphasis added.) H.R. Rep. No. 1999, 76th Cong., 3d Sess. 2 (1940); S. Rep. No. 1523, 76th Cong., 3d Sess. 2 (1940).

The Department of Interior memorandum accompanying Secretary Burlew's letter leaves little doubt that 18 U.S.C. § 3243 was intended to confer jurisdiction to Kansas over all criminal offenses, including those listed in 18 U.S.C. § 1153. The memorandum provides in pertinent part:

> *"The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not*. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes; the Indians desire that they continue to do so; and a division of jurisdiction with respect to particular crimes based upon the place of their commission is rendered undesirable by the mutual interspersion of restricted and unrestricted holdings. The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable." (Emphasis added.) H.R. Rep. No. 1999, at 5 and S. Rep. No. 1523, at 4.

Additionally, the memorandum clarifies the reason why the original version of the House and Senate bills, which contained a reference to the relinquishment of concurrent jurisdiction to Kansas, was later modified to delete that reference:

> "[The House and Senate Bills did] not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to 'relinquish concurrent jurisdiction' to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State *complete* criminal jurisdiction, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law." (Emphasis added.)

H.R. Rep. No. 1999, at 3 and S. Rep. No. 1523, at 2.

The *Iowa Tribe* case is now on appeal to the Tenth Circuit Court of Appeals. This pending appeal has no bearing on our consideration of this issue since the supremacy clause of the United States Constitution is invoked only by a decision of the United States Supreme Court.

However, we find Judge O'Connor's opinion in *Iowa Tribe* persuasive and conclude from the additional legislative history considered therein that Congress' intent in enacting 18 U.S.C. § 3243 was to grant the State of Kansas jurisdiction over all crimes committed by or against Indians on Indian reservations located in Kansas. The United States retains concurrent jurisdiction with Kansas over crimes listed in the Federal Major Crimes Act. 18 U.S.C. § 1153.

We hold that *State v. Mitchell*, 231 Kan. 144, 642 P.2d 981 (1982), is overruled and the judgments of the trial courts are reversed and the cases remanded for appropriate action.

• • •

United States District Court,
D. Kansas.

Emery L. NEGONSOTT, Petitioner,

v.

Harold SAMUELS, et al., Respondents.

Civ. A. No. 88-3049-S.

Sept. 22, 1988.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

This matter is before the court on a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner, an inmate at the Kansas State Penitentiary, Lansing, Kansas, alleges that Kansas lacks jurisdiction over his criminal acts.

Petitioner is a Kickapoo Indian who was charged with aggravated battery for the shooting of another Kickapoo Indian within the territorial confines of the Kickapoo Indian Nation Reservation. Because the reservation is located within Brown County, Kansas, petitioner was tried before a jury in the district court of Brown County. Although the jury found petitioner guilty, the district court set aside the conviction for lack of jurisdiction. Upon appeal by the State, the Kansas Supreme Court upheld petitioner's conviction and held that Kansas had jurisdiction over all crimes committed by or against Indians on Indian Reservations in Kansas. *State v. Nioce*, 239 Kan. 127, 716 P.2d 585 (1986).

DISCUSSION

The only issue before this court is whether Kansas has jurisdiction over Indian offenses falling within the scope of the Federal Major Crimes Act. 18 U.S.C. § 1153. To decide this issue, the court must interpret federal statute 18 U.S.C. § 3243, which provides:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The apparent ambiguity of the statute is created by the language of the second paragraph. Although the first paragraph appears to confer jurisdiction on the State of Kansas over all Indian offenses committed within the State, the second paragraph's reservation of federal jurisdiction makes the extent of this conveyance ambiguous.

Petitioner argues that 18 U.S.C. § 3243 provides for exclusive federal jurisdiction for crimes falling within the scope of the Federal Major Crimes Act. 18 U.S.C. § 1153. Because aggravated battery is covered by the Federal Major Crimes Act, petitioner argues that Kansas lacks jurisdiction over his offense. In contrast, respondent argues that 18 U.S.C. § 3243 grants Kansas jurisdiction

over all offenses committed by or against Indians on Indian reservations within the state.

This case is not the first time this court has been asked to interpret 18 U.S.C. § 3243. In *Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas*, No. 83-4304 (D.Kan. May 30, 1984) [available on WESTLAW, 1984 WL 2754], this court was faced with the issue of whether the State of Kansas had jurisdiction to prosecute members of the Iowa Tribe of Indians of Kansas and Nebraska for selling "pull-tab cards" in connection with bingo games conducted on the Tribe's reservation. Interpreting the statute in light of its legislative history, this court concluded that Kansas had jurisdiction over non-major state offenses committed by or against Indians on Indian reservations located in the state of Kansas. On appeal, the Tenth Circuit Court of Appeals affirmed this court's decision. *Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas*, 787 F.2d 1434 (10th Cir. 1986). Because the sale of "pull-tab cards" did not fall within the scope of the Federal Major Crimes Act, neither this court nor the Tenth Circuit Court of Appeals reached the issue raised by this case.

Like the Kansas Supreme Court in *Nioce* and the Tenth Circuit Court of Appeals in *Iowa Tribes*, this court finds persuasive the legislative history of 18 U.S.C. § 3243. Of particular relevance is the report of E.K. Burlew, Acting Secretary of the Interior, to Representative Will Rogers, Chairman of the House Committee on Indian Affairs. This report, contained in House Report No. 1999, 76 Cong., 3rd Sess. (1940), consists of a letter and memorandum discussing the purpose and effect of the proposed legislation.

In his letter, Burlew explained the two main reasons for introducing the proposed legislation. First, Burlew noted that the federal criminal statutes applicable to Indian reservations were limited in scope and left some major crimes as well as most minor offenses outside the jurisdiction of the federal courts. H.R. Rep. No. 1999, 76th Con., 3rd Sess. 2 (1940). Second, Burlew explained that, because more than two-thirds of the area within the reservation boundaries had passed beyond federal criminal jurisdiction due to the issuance of unrestricted patents, administrative convenience necessitated extending jurisdiction to Kansas over criminal matters. *Id.*

Burlew further explained that the proposed legislation was a codification of the ongoing practice in Kansas:

> With the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, including those covered by Federal statutes. The legality of this practice being questioned recently, the tribal counsels of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance by a transfer of jurisdiction to the State.

Id.

Later in his report, Burlew made it clear that the proposed legislation was intended to confer complete jurisdiction upon the State of Kansas, with the result that the Kansas courts and Federal courts would have concurrent jurisdiction over crimes falling within the scope of the Major Crimes Act:

> The bill proposes to "relinquish concurrent jurisdiction" to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining, however, jurisdiction in Federal courts to prosecute crimes by or against Indians defined by Federal law.

Id.

That this was the purpose of the statute is further supported by the Department of Interior memorandum accompanying Burlew's letter:

> This proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes; the Indians desire that they continue to do so; and a division of jurisdiction with respect to particular crimes based upon the place of their commission is rendered undesirable by the mutual interspersion of restricted and unrestricted holdings. The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable.

Id. at 4.

Based upon the legislative history of the statute in question, the court concludes that Congress intended to grant the State of Kansas jurisdiction over all crimes committed by or against Indians on Indian reservations located in Kansas. The court also finds that the Kansas courts and the Federal courts have concurrent jurisdiction over crimes that fall within the scope of the Federal Crimes Act. 18 U.S.C. § 1153.

Having reached this conclusion, the court finds that the petition for writ of habeas corpus currently before the court must be dismissed. Pursuant to 18 U.S.C. § 3243, Kansas had jurisdiction over the aggravated battery committed by petitioner, notwithstanding the fact that the crime fell within the scope of the Federal Major Crimes Act. 18 U.S.C. § 1153.

IT IS THEREFORE ORDERED that the petition for writ of habeas corpus be dismissed and all relief denied.

United States Court of Appeals,
Tenth Circuit.

Emery L. NEGONSOTT,
Plaintiff-Appellant,

v.

Harold SAMUELS and the Attorney General of the State of Kansas,
Defendants-Appellees.

No. 88-2666.

May 8, 1991.

Before HOLLOWAY, Chief Judge,

SEYMOUR and EBEL, Circuit Judges.

SEYMOUR, Circuit Judge.

This habeas case requires us to determine the scope of criminal jurisdiction granted by 18 U.S.C. § 3243 (1988) to the State of Kansas over state-law offenses committed by Indians on Indian lands. Petitioner Emery L. Negonsott claims that Kansas lacked subject matter jurisdiction to prosecute him for aggravated battery because that offense is within exclusive federal jurisdiction under the Federal Major Crimes Act, 18 U.S.C. § 1153 (1988). The district court held that the State had jurisdiction. We agree and conclude that the federal grant of criminal jurisdiction to the State of Kansas in section 3243 extends to state-law offenses that are also crimes enumerated in the Major Crimes Act.

I.

Negonsott belongs to the Kickapoo Tribe and resided during 1985 on the Kickapoo reservation in Brown

County, Kansas. He was arrested, charged, and convicted in that year of aggravated battery in the District Court of Brown County for shooting another Kickapoo Indian on the Kickapoo reservation. *See* Kan.Stat.Ann. § 21-3414 (1988). The state trial judge, relying on *State v. Mitchell*, 231 Kan. 144, 642 P.2d 981 (1982), vacated the conviction for lack of subject matter jurisdiction. On appeal, the Kansas Supreme Court reversed in a decision overruling *Mitchell*, and Negonsott's case was remanded for sentencing. *See Kansas v. Nioce*, 239 Kan. 127, 716 P.2d 585 (1986). Negonsott was sentenced to imprisonment for a term of three to ten years.

Negonsott filed a petition for a writ of habeas corpus in the United States District court for the District of Kansas, continuing his claim that the State of Kansas lacked jurisdiction to convict him for the offense of aggravated battery as defined by Kansas state law. The district court denied the writ and Negonsott appeals.

II.

The sole issue in this case is whether 18 U.S.C. § 3243 confers jurisdiction on the State of Kansas to prosecute petitioner, a Kickapoo Indian, for the state-law crime of aggravated battery against another Indian committed on the reservation. This question of statutory interpretation is one of law, which we review *de novo*. *See Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir.1990).

In analyzing the criminal jurisdiction of the State of Kansas over crimes involving Indians committed on Indian land, we begin with the language of the relevant statutes. It is elementary that "[i]n construing a statute

we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979). If a statute is susceptible to two meanings, a court will choose a meaning that gives full effect to all the provisions of the statute. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249, 105 S.Ct. 2587, 2594, 86 L.Ed.2d 168 (1985). Moreover, statutes should be construed so that their provisions are harmonious with each other. *See United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1184 (6th Cir.1982).

The Statute under which the State of Kansas claims subject matter jurisdiction provides:

> "Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, *to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.*
>
> *"This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States* committed by or against Indians on Indian reservations."

18 U.S.C. § 3243 (emphasis added). The second sentence of this statute appears to refer in part to the Indian Major Crimes act, which provides:

> "(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with

> intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, . . . within the Indian Country, *shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.*
>
> "(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

18 U.S.C. § 1153 (1988) (emphasis added). A separate statute governs the jurisdiction and venue of the Major Crimes Act as follows:

> "All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title *shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States."*

18 U.S.C. § 3242 (1988) (emphasis added).[1]

---

[1] The predecessor to sections 1153 and 3242 was initially passed in 1885 in response to the Supreme Court's opinion in *Ex Parte Crow Dog*,109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883), which held that the limited jurisdiction of the federal courts did not extend to crimes by an Indian against another Indian on an Indian reservation. *See United States v. Kagama*, 118 U.S. 375, 383, 6 S.Ct. 1109, 1113, 30 L.Ed. 228 (1886). In the original enactment, what are now sections 1153 and 3242 were combined in one provision. Act of Mrch 3, 1885, ch. 341, § 9, 23 Stat. 385.

The crimes of assault with dangerous weapon and assault resulting in serious bodily injury, named in the Major Crimes Act, are defined for purposes of federal jurisdiction at 18 U.S.C. §§ 113(c) & (f) (1988). Federal jurisdiction over major crimes committed by Indians has been held to be exclusive. *See United States v. John*, 437 U.S. 634, 651, 98 S.Ct. 2541, 2550, 57 L.Ed.2d 489 (1978); *United States v. Antelope*, 430 U.S. 641, 649 n. 12, 97 S.Ct. 1395, 1400 n. 12, 51 L.Ed.2d 701 (1977); *Seymour v. Superintendent*, 368 U.S. 351, 359, 82 S.Ct. 424, 429, 7 L.Ed.2d 346 (1962); *see also Langley v. Ryder*, 778 F.2d 1092, 1096 n.2 (5th Cir. 1985)(holding that section 1153 preempts state criminal jurisdiction, citing *John*). Negonsott contends that the Kansas Act did not confer jurisdiction on the Kansas state courts over those corresponding state law offenses which are also included in the Major Crimes Act and which are otherwise within exclusive federal jurisdiction.

The first sentence of the Kansas Act at issue, here *see* supra at 4, unambiguously confers criminal jurisdiction on the State of Kansas over offenses committed by Indians against Indians on Indian reservation land *"to the same extent* as its courts have jurisdiction over offenses committed elsewhere within the State *in accordance with the laws of the state."* 18 U.S.C. § 3243 (emphasis added). In other words, the grant of state jurisdiction over *all* types of state crimes is complete. The second sentence of the Kansas Act appears intended to ensure that the congressional grant of jurisdiction to Kansas state courts over

state-law crimes contained in the first sentence would not "deprive" the United States courts of its jurisdiction over federally-defined offenses committed by or against Indians on Indian reservations. An ambiguity exists, however, because as we have noted federal jurisdiction over major crimes committed by Indians would otherwise be exclusive. Thus, we must resolve whether Congress intended to grant Kansas courts concurrent jurisdiction with federal courts over the crimes enumerated in the Major Crimes Act, or whether by the second sentence of the Kansas Act Congress intended to retain exclusive jurisdiction in the federal courts over those specific crimes.

The second sentence of the Kansas Act is of little help in resolving this conflict, since the words "shall not deprive the courts of the United States of jurisdiction" may be read in at least two ways. Congress may have intended, as argued by Negonsott, that the Kansas Act not deprive the federal court of any *exclusive* jurisdiction it enjoyed under existing law. Or, Congress may have meant to preserve the *scope* of federal jurisdiction over federally-defined crimes on Indian land, while modifying the *exclusive* jurisdiction of the federal courts in favor of concurrent jurisdiction where the federally defined crimes and crimes under Kansas law overlapped.

In resolving this ambiguity, we are mindful that " 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' " *Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976) (quoting *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918)).

However, "statutory provisions which are not clear on their face may 'be clear from the surrounding circumstances and legislative history.' " *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n. 17, 98 S.Ct. 1011, 1020 n. 17, 55 L.Ed.2d 209 (1978) (citing *DeCoteau v. District County Court*, 420 U.S. 425, 447, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975)); *see also Jones v. Intermountain Power Project*, 794 F.2d 546, 552 (10th Cir.1986). We accordingly look to legislative history to determine whether Congress intended to affect the exclusivity of federal jurisdiction over enumerated major crimes committed by Indians by passing the Kansas Act.

In enacting the Kansas Act, both the House and Senate Committees on Indian Affairs submitted reports. These reports incorporated a letter from the Acting Secretary of the Interior to the Chairman of the House Committee on Indian Affairs concerning the bill. The letter explained the problems the legislation was designed to address and how the bill intended to solve them. *See* Letter from E.K. Burlew, Acting Secretary of the Interior, to Rep. Will Rogers, Chairman of the House Committee on Indian Affairs, *reprinted in* H.R. Rep. No. 1999, 76th Cong. 3d Sess. 1-3 (1940) (House Report); *see also* Sen. Rep. No. 1523, 76th Cong. 3d Sess. 1-3 (1940). The Secretary noted that federal jurisdiction over crimes concerning Indians on Indian land had been limited, leaving "some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts." House Report at 2. Because the state lacked jurisdiction over such offenses, maintenance of law and order depended on the tribal courts, which had not functioned

on Kansas reservations for many years. To fill this void, and

> "[w]ith the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, *including those covered by Federal statutes. The legality of this practice being questioned recently, the tribal councils of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance* by a transfer of jurisdiction to the State."

Id. (emphasis added).

The Secretary also noted that the issuance of unrestricted patents for alloted lands interspersed with tribal and restricted lands created a jurisdictional checkerboard, resulting in practical difficulties. These difficulties

> "can be most effectively met by conferring criminal jurisdiction over the entire area on the State. These considerations of administrative convenience *extend to those offenses which are now cognizable in the Federal courts under the reservation statutes as well as those which are not."*

Id. (emphasis added). Although the proposed legislation extended to the types of offenses then cognizable under federal law, the Secretary specifically observed that "[e]nactment of the bill will not prevent the prosecution in the Federal courts of those acts which are within the cognizance of these courts under existing law." *Id.* at 2-3. These comments in the House and Senate Reports reflect an understanding that the proposed legislation would legalize the State's assertion of complete criminal jurisdiction under state law over the Indian tribes without

depriving the federal court of its more limited criminal jurisdiction by virtue of preexisting jurisdictional grants such as the Major Crimes Act.

Like the court in *Youngbear v. Brewer,* 415 F.Supp. 807 (N.D. Iowa 1976), *aff'd,* 549 F.2d 74 (8th Cir.1977) (construing analogous Iowa Act),[2] Negonsott relies heavily on a letter from Representative W.P. Lambertson of Kansas to the House Committee on Indian Affairs in support of his position that the scope of the Kansas State Court's jurisdiction under the Kansas Act does not extend to offenses enumerated in the Major Crimes Act. In his letter in support of the legislation, Lambertson stated that "[t]he Government here relinquishes to the state *full* jurisdiction over the Indians for *small* offenses." House Report at 1-2 (emphasis added). Negonsott interprets this letter as necessarily implying that federal courts were to retain exclusive jurisdiction over *major* offenses. Although it is possible, of course, that Congressman Lambertson meant to imply by this statement that the State of Kansas would assume no jurisdiction over the types of crimes covered in the Major Crimes Act, this implication is by no means a necessary one. It is also possible that Representative Lambertson understood the bill to confer "full" jurisdiction

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[2] The Eighth Circuit in *Youngbear* interpreted a Congressional grant of criminal jurisdiction to the state courts of Iowa over the Sac and Fox Indians virtually identical to the grant of jurisdiction to the Kansas State Courts at issue here. *See* Act of June 30, 1948, ch. 759, 62 Stat. 1161, Publ.L. No. 846. The court relied on the legislative history of the Kansas Act, after which the Iowa Act was modeled, to support its conclusion that the Iowa Act did not confer, state court jurisdiction over crimes enumerated in the Major Crimes Act. *See* 549 F.2d at 76.

over small crimes occurring among Indians to fill the void left by the tribal courts, while conferring concurrent power to prosecute the types of crimes covered by the Major Crimes Act. If we give Negonsott's interpretation credence, we are at a loss to explain why it contravenes the memorandum and letter from the Secretary of the Interior, incorporated along with Representative Lambertson's letter into the House and Senate Reports, which clearly evince an understanding that Kansas under the Act as amended could exercise criminal jurisdiction over all state-law crimes occurring on Indian lands.

The Eighth Circuit in *Youngbear* and Negonsott also attach much significance to the amendment of the title of the bill, replacing the phrase "concurrent jurisdiction" with the word "jurisdiction,"[3] and eliminating the reference to modification of the Major Crimes Act. *See* 86 Cong.Rec. 5596-97, 76th Cong. 3d Sess. (May 6, 1940).[4]

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[3] As originally drafted, the Kansas Act was entitled a "bill to relinquish concurrent jurisdiction to the State of Kansas to prosecute Indians or others for offenses committed on Indian reservations." H.R.Rep. No. 999, 76th Cong., 3d Sess., accompanying H.R. 3048. This language was amended to read: "A bill to confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations." *Id.*

[4] As originally drafted, the Kansas Act would have provided as follows:

> "Be it enacted . . . that *concurrent* jurisdiction is hereby relinquished to the State of Kansas to prosecute Indians and others for offenses by or against Indians or others, committed on Indian reservations in Kansas, including trust or restricted allotments, to the same extent as its courts have jurisdiction for offenses committed elsewhere within the State in accordance with the laws of the State; *and section 328 of the Act of March 4, 1909 (35 Stat. 1151) as amended by the Act of June 28, 1932 (47 Stat. 337) and sections 2145 and 2146 of the United States Revised Statutes* (U.S.C., title 18, section 548, title 25, secs. 217, 218), *are modified accordingly* insofar as they apply to Indian reservations or Indian county in the said State of Kansas."

86 Cong.Rec. 5596, 76th Cong. 3d Sess (May 6, 1940)(emphasis added).

However, the Secretary, who recommended the revisions, offered an explanation in his letter. Regarding amendment of the title "for clarification," he stated:

> "[T]he bill, as now worded, does not express with entire accuracy the legal situation as it now exists or as intended to be treated. The bill proposes to relinquish concurrent jurisdiction to the State of Kansas, *intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by state law.* However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, *this is* not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but *a case of conferring upon the State complete criminal jurisdiction, retaining however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law."*

House Report at 3 (emphasis added). The term "concurrent jurisdiction" was thus removed because it did not accurately describe the bill in any of its forms. Federal courts did not exercise jurisdiction over all state-law offenses, and therefore those courts would not be sharing

concurrent jurisdiction with Kansas over all crimes. Conversely, federal courts under the Major Crimes Act possessed exclusive jurisdiction over the crimes enumerated therein. At the time of its enactment, therefore, the Kansas Act was to confer *concurrent* jurisdiction *only* as to those crimes covered by the Major Crimes Act. As explained by the Secretary, Congress' decision to excise the word "concurrent" from the title of the Act was to clarify rather than to change its substance. Reference to modification of the Major Crimes Act was apparently dropped as unnecessary when the second sentence of the Kansas Act was added instead.

Negonsott maintains that construing the Kansas Act to confer jurisdiction on the state courts over crimes enumerated in the Major Crimes Act is inconsistent with the well-settled rule that " 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' " 426 U.S. at 392, 96 S.Ct. at 2112 (quoting *Alaska Pac. Fisheries*, 248 U.S. at 89, 39 S.Ct. at 42. If we were to adopt the state's interpretation, Negonsott contends, the historically exclusive stewardship of the federal government over major crimes committed on a reservation would be eliminated, and Indians could be subject to double prosecution under both federal and state law.

We do not believe that our interpretation is inconsistent with this canon of statutory construction. The Kansas tribes themselves, in the interest of establishing law and order on Indian lands, "expressed a wish that the jurisdiction hitherto exercised by the State courts [over both major and minor crimes] be continued." House Report at

4-5. We are unwilling to conclude that state court criminal jurisdiction *conferred by Congress in response to tribal requests* invades the special relationship between the tribes and the federal government. If anything, the Kansas Act reflects congressional responsiveness to Tribal needs for unified law enforcement as expressed by the Tribes themselves.

As to any prejudice the tribes may suffer from overlapping state and federal jurisdiction, the overlap resulted from legislation requested of Congress by the Tribes. No instance of double prosecution under the scheme Kansas has been brought to our attention and, in any event, this hypothetical burden is not peculiar to Indian lands, but applies to nearly all Americans who live under overlapping federal and state jurisdictions.[5]

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[5] It is arguable that double jeopardy would attach to successive prosecutions under the Kansas Act and the Major Crimes Act. Negonsott cites *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), in support of his double jeopardy argument. *Wheeler* concerned successive prosecutions under tribal law in tribal court and under federal law in federal court. The Court held that double jeopardy did not attach because the Tribe retained inherent tribal sovereignty apart from the exercise of federal sovereignty in the subsequent prosecution. *Id.* at 329-30, 98 S.Ct. at 1089-90. The present case, by contrast involves the exercise of state authority *pursuant to a congressional delegation of authority under federal sovereign power.* The Kansas state court is arguably an arm of the federal government when it prosecutes under the Kansas Act, thereby barring subsequent federal prosecutions in federal court. *See id.* at 327 n. 26, 98 S.Ct. at 1088 n. 26. We need not and do not decide this issue.

In sum, we conclude that the purpose of the Kansas Act as reflected in its legislative history indicates that Congress intended to confer jurisdiction on the Kansas state court to prosecute petitioner for aggravated battery, a state-law crime also enumerated and defined for purposes of federal court jurisdiction in the Major Crimes Act. We therefore AFFIRM the district court's dismissal of the petition.

Supreme Court of the United States

No. 91-5397

Emery L. Negonsott,

Petitioner

v.

Harold Samuels, Warden, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 29, 1992

No. 91-5397

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

EMERY L. NEGONSOTT,
Petitioner,

v.

HAROLD SAMUELS, WARDEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONER

PAMELA S. THOMPSON
325 Cutspring Road
Stratford, Connecticut 06497
(203) 375-3249
Counsel for Petitioner

QUESTION PRESENTED

Whether 18 U.S.C. section 3243 confers concurrent criminal jurisdiction on the State of Kansas to prosecute Petitioner for the crime of aggravated battery, one of the crimes included in the Major Crimes Act, 18 U.S.C. section 1153, when the prosecution of such crimes is within the exclusive jurisdiction of the Federal Courts.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of court of appeals (JA 17-30) is reported at 933 F.2d 818 (10th Cir.1991). The opinion of the district court (JA 11-16) is reported at 696 F.Supp. 561 (D.Kan.1988). The opinion of the Kansas Supreme Court (JA 3-10) is reported at 239 Kan. 117, 716 P.2d 585 (1986).

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1991. The petition for writ of certiorari was filed on August 5, 1991, and was granted on June 29, 1992. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 18 U.S.C. section 3243:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or againt Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

This case also concerns the Major Crimes Act, 18 U.S.C. Section 1153:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A (18 U.S.C.S. section 2241, et seq.), incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title (18 U.S.C.S. section 661) within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

STATEMENT OF THE CASE

This is an Indian criminal jurisdiction issue challenging the jurisdiction of the State of Kansas to prosecute Petitioner under 18 U.S.C. section 3243 for the crime of aggravated battery, a crime enumerated in the Major Crimes Act, 18 U.S.C. section 1153.

The facts of this case are not in dispute. Petitioner, Emery L. Negonsott is an enrolled member of the Kickapoo Tribe in Kansas and a resident of the Kickapoo reservation. On January 3, 1985 a complaint charging the Petitioner with the offense of aggravated battery in violation of K.S.A. 21-3414 was filed in the District Court of Brown County, Kansas. (JA 1) Petitioner was accused of shooting another Kickapoo Indian within the confines of the Kickapoo Reservation. Petitioner was arrested and on March 26, 1985 found guilty of the offense after a jury trial.(JA 1) On April 11, 1985, Petitioner's counsel filed a motion to dismiss on the basis that the prosecution of Petitioner was within the exclusive jurisdiction of the federal courts under the Major Crimes Act, 18 U.S.C. Section 3243. (JA 1) Judge Stevenson, the trial judge, relying on *State of Kansas v. Mitchell*, 231 Kan. 142, 642 P.2d 981 (1982), set aside the conviction for lack of criminal subject matter jurisdiction. (JA 1) The State of Kansas appealed Judge Stevenson's order to the Kansas Supreme Court. (JA 1) Overturning their 1982 decision in *Mitchell*, the Kansas Supreme Court reversed the order of the Brown County District Court. *State of Kansas v. Negonsott*, 239 Kan. 127, 716 P.2d 585 (1986). (JA 1) The Kansas Supreme Court held that the state courts retained concurrent jurisdiction with the federal courts over crimes listed in the Major Crimes Act. The court based its holding on an interpretation of the legislative history of the Kansas Act. 239 Kan. at 577-578.

Petitioner's case was remanded to the District Court for sentencing and he was sentenced to a term of three

to ten years. (JA 1) Petitioner served eighteen (18) months of his sentence in a state correctional facility.

On February 5, 1988, Petitioner filed a writ of habeas corpus with the United States District Court for the District of Kansas (JA 1), challenging the jurisdiction of the state court. On September 22, 1988 the writ was dismissed. (JA 2) In dismissing the writ, the district court held that the state and federal courts had concurrent jurisdiction over a crime enumerated in the Major Crimes Act. *Negonsott v. Samuels*, 696 F.Supp. 561, 562-63 (D. Kan. 1988). The district court based its decision on the legislative history of the Kansas Act.

On October 21, 1988, the decision of the District Court was appealed to the Tenth Circuit Court of Appeals. (JA 2). The court of appeals upheld the decision of the lower court. The appellate court found the language of the Kansas Act ambiguous, analyzed the legislative history of the Act and concluded that Congress intended to confer concurrent jurisdiction on both the federal courts and the Kansas courts over state-defined crimes listed in the Major Crimes Act.

SUMMARY OF ARGUMENT

The Major Crimes Act, 18 U.S.C. section 1153 provides for exclusive federal jurisdiction over an Indian defendant who commits a crime enumerated in that Act against another Indian within Indian Country. Petitioner's crime of aggravated battery is denfied for purposes of federal jurisdiction in 18 U.S.C. Section 113(c) and (f) (assault with a dangerous weapon and assault resulting in serious bodily injury).

18 U.S.C. section 3243 (the "Kansas Act"), passed by Congress in 1940, granted to the State of Kansas criminal jurisdiction "to the same extent as its courts had jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State." However, the Act did "not deprive the courts of the United States of

jurisdiction over offenses defined by the laws of the United States."

Petitioner contends that the Kansas Act interpreted in conjunction with the Major Crimes Act granted the State of Kansas criminal jurisdiction only over misdemeanor offenses, while retaining exclusive federal jurisdiction over Major Crimes.

An analysis of the entire legislative history, in particular the letter from Congressman Lambertson, and the analysis of the legislative history of the Kansas Act by the Federal District Court and the Eighth Circuit Court of Appeals in *Youngbear v. Brewer*, 415 F.Supp. 807 (N.D. Iowa 1976), *aff'd* 549 F.2d 74 (8th Cir. 1977) supports Petitioner's position and clearly shows that the Kansas Act granted the state jurisdiction over misdemeanor offenses while reserving exclusive federal jurisdiction over felony offenses enumerated in the Major Crimes Act.

The decision of the Tenth Circuit, holding otherwise, is erroneous.

ARGUMENT

WHETHER 18 U.S.C. SECTION 3243 CONFERS JURISDICTION ON THE STATE OF KANSAS TO PROSECUTE PETITIONER FOR THE CRIME OF AGGRAVATED BATTERY, ONE OF THE CRIMES INCLUDED IN THE MAJOR CRIMES ACT, 18 U.S.C. SECTION 1153, WHEN THE PROSECUTION OF SUCH CRIMES IS WITHIN THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURTS.

A. The Federal Courts Have Exclusive Jurisdiction Over a Crime Enumerated in the Major Crimes Act.

18 U.S.C. Section 3243 provides:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same

extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The court of appeals found that the Kansas Act conferred concurrent criminal jurisdiction on the State of Kansas to prosecute Petitioner for a offense enumerated in the Major Crimes Act. *Negonsott*, at 824. The failure of the Court of appeals to recognize and uphold the exclusivity of federal jurisdiction under the Major Crimes Act is inconsistent with prior decisions of this Court. The analysis by the court of appeals of the Kansas Act gives full effect to that Act, while ignoring and negating the import of the Major Crimes Act.

The Major Crimes Act provides:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A (18 U.S.C.S. section 2241, et seq.), incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title (18 U.S.C.S section 661) within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offenses referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offenses was committed as are in force at the time of such offense.

A separate staute governs jurisdiction and venue for offenses under the Act:

All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.

18 U.S.C. Section 3242.

The Major Crimes Act was passed by Congress in 1885 to fill the jurisdictional void created by the case of *Ex Parte Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883). In that case an Indian was accused of murdering another Indian in Indian Country. The issue before this Court was whether a South Dakota court, acting as a circuit court of the United States had jurisdiction to prosecute the defendant. This Court held that it did not and that the only entity with jurisdiction to prosecute Crow Dog was his tribe.

Since its passage in 1885 the Major Crimes Act has been consistently held to vest the United States District Courts with exclusive subject matter jurisdiction over its enumerated offenses.

The first case to interpret the Major Crimes Act was *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886) which held that the Act conferred *ex-exclusive federal jurisdiction* over the enumerated federal crimes. *Kagama*, at 384. In analyzing the Major Crimes Act, this Court stated its reasons for holding that federal jurisdiction was exclusive:

These Indian Tribes are the wards of the Nation. They are communities dependent on the United States . . . dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their

> deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress whenever the question has arisen . . .
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the Tribes.

Kagama, at 384-385.

In other words, the purpose of the Major Crimes Act is to protect Indian people from the prejudices of their non-Indian neighbors and to preclude state legislative interference in their affairs.

This Court has consistently reaffirmed the jurisdictional exclusivity of the Major Crimes Act in subsequent decisions. *Keeble v. United States*, 412 U.S. 205, 209-212, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 259, 3 L.Ed.2d 251 (1959); *United States v. John*, 437 U.S. 6, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

Despite the decisions of this Court, the court of appeals held that Congress impliedly modified this exclusive jurisdiction of the federal courts by the second sentence of the Kansas Act which retains federal jurisdiction over "offenses defined by the laws of the United States committed by or against Indians on Indian reservations." *Negonsott*, at 823.

Had Congress wished to modify the Major Crimes Act it could have done so by passing the first version of the bill which expressly provided for concurrent jurisdiction and which explicitly modified the Major Crimes Act.

The statute as originally drafted provided:

> Be in enacted . . . That *concurrent* jurisdiction is hereby relinquished to the State of Kansas to prosecute Indians and other for offenses by or against Indians or others, committed on Indian reservations in Kansas, including trust or restricted allotments, to the same extent as its courts have jurisdiction for offenses committed elsewhere within the state in accordance with the laws of the State; and section 328 of the Act of March 4, 1909 (35 Stat. 1152), as amended by the Act of June 28, 1932 (47 Stat. 337), and sections 2145 and 2146 of the United States Revised Statutes (U.S.C., title 18, section 548, title 25, secs. 217, 218 are modified accordingly insofar as they apply to Indian reservations or Indian country in the said State of Kansas.

86 Cong. Rec. 5596 (1940). (Emphasis added.)

Petitioner argued before the court of appeals that the deletion of the word "concurrent" and the elimination of the reference to modify the Major Crimes Act showed that Congress did not intend to grant Kansas concurrent jurisdiction over crimes enumerated in the Act.

Both the court of appeals and the Solicitor General, in his amicus brief, excuse the failure of Congress to pass the initial version by reference to Secretary Burlew's letter. The court of appeals stated:

> The term "concurrent jurisdiction" was thus removed because it did not accurately describe the bill in any of its forms. Federal courts did not exercise jurisdiction over all state-law offenses, and therefore those courts would not be sharing concurrent jurisdiction with Kansas over all crimes. Conversely, federal

> courts under the Major Crimes Act possessed exclusive jurisdiction over the crimes enumerated therein. At the time of its enactment, the Kansas Act was to confer concurrent jurisdiction only as to those crimes covered by the Major Crimes Act. As explained by the Secretary, Congress' decision to excise the word "concurrent" from the tile of the Act was to clarify rather than to change its substance. Reference to modification of the Major Crimes Act was apparently dropped as unnecessary when the second sentence of the Kansas Act was added instead.

Negonsott, at 823.

If, as Mr. Burlew stated, the first version of the bill did not reflect the true situation as it existed in Kansas, all Congress had to do was change a few words in this initial version to clarify that Kansas and the federal courts were to have concurrent jurisdiction over the major crimes.

Second, no matter what the practice in Kansas may have been the only entity with jurisdiction over major crimes was the federal courts. In order to change this, Congress would have had to explicitly repeal or modify the Major Crimes Act as it pertained to Kansas. Yet, Congress failed to do so. "When legislators delete language, we may assume that they intended to eliminate the effect of the previous wording." *Youngbear v. Brewer*, 415 F.Supp. 807, 813, (N.D. Iowa 1976) *aff'd*, 549 F.2d 74 (8th Cir. 1977); *Stewart v. Ragland*, 934 F.2d 1033 (9th Cir. 1991).

When Congress wishes to convey criminal jurisdiction to states, Congress makes that intent unequivocally clear. In 1953, during the termination era, Congress passed a law commonly referred to as Public Law 280. P.L. 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588), codified at 18 U.S.C. section 1162 transferred criminal jurisdiction over Indian country from the federal to state governments in five states. The language of 18 U.S.C. section 1162 is unequivocal and specific:

> (a) Each of the States of Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Terriory, and the criminal laws of such State or Terriory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
> . . .
>
> (c) The provisions of sections 1152 and 1153 of this chapter (18 U.S.C. section 1152 and 1153) shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

Surely Congress would have been just as specific in drafting 18 U.S.C. Section 3243 as it had been in drafting 18 U.S.C. Section 1162, had it wished to grant concurrent jurisdiction under the Kansas Act to the state for major crimes.

This Court can only conclude that by deleting the word "concurrent" and eliminating any reference to the Major Crimes Act, Congress intended to retain exclusive federal jurisdiction over the Major Crimes Act. For when Congress changes a jurisdictional scheme by vesting states with jurisdiction it does so with clarity and precision.

Moreover, absent a clear expression of Congressional intent, the state of Kansas and the federal courts cannot have concurrent jurisdiction over offenses included in the Major Crimes Act. To hold otherwise would violate the rules of statutory construction developed by this Court.

The first rule of statutory construction in relation to Indians requires that laws must be liberally construed to favor Indians and that ambiguous statutes should be liberally construed in favor of Indians and not to their prejudice. *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct.

2102, 48 L.Ed.2d 710 (1976); *Antoine v. Washington*, 420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975).

This canon of construction is based on the special trust relationship between the United States and Indian people first articulated by this Court in *Cherokeee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The Cherokee Nation sued the State of Georgia to enjoin enforcement of state laws on their reservation. This Court held that it lacked original jurisdiction because the tribe, although a distinct political society, was neither a state of the United States nor a foreign state and therefore not entitled to bring the suit initially in this court. *Cherokee Nation v. Georgia*, at 19. The court concluded that Indian tribes:

> may, more correctly, perhaps, be denominated domestic dependent nations . . . in a state of pupilage . . . their relation to the United States resembles that of a ward to his guardian.

Id., at 17.

Since *Cherokee Nation v. Georgia*, federal actions toward Indians, whether by treaty, statute, agreement, executive order or administrative regulation, have been construed in light of this trust responsibility. The canons of construction mandate for broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited. Above all, when Congress is exercising its authority over Indians, the trust obligation requires that Congressional statutes be based on a determination that Indians will be protected. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221-225 (1982).

To interpret 18 U.S.C. section 3243 as the Tenth Circuit has would work to the prejudice of the Indian tribes of Kansas.

First, the court of appeal's interpretation would eliminate the historically exclusive stewardship of the federal

government over major crimes committed by Indians on the reservation. *United States v. Kagama*, at page 384.

If this Court accepts the argument that the State of Kansas and the federal government have concurrent jurisdiction over major crimes, tribal members would be subject to double prosecution since the State of Kansas and the United States government are separate sovereigns. *United States v. John*, 437 U.S. 6324, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

> (Assumption of state jurisdiction over major crimes) would also subject the Sac and Fox to the difficulties of conforming their behavior to the standards to two sovereigns, and perhaps thereby incur a double prosecution for essentially one offense . . . Such a result is clearly not favorable to the Sac and Fox Tribe and should only be accomplished by explicit direction from Congress.

Youngbear, at 812.

It is inconceivable that Congress would pass a law subjecting a Kansas Indian to prosecution under both the state and federal courts.

The court of appeals dismissed this argument of Petitioner's by stating that no one has ever been subject to double prosecution and that this burden applies to all Americans who live under overlapping federal and state jurisdiction. The court goes on to state that when Kansas prosecutes under the Kansas Act the state is acting as an arm of the federal government and therefore federal prosecution would be barred. *Negonsott*, at 823-824.

The argument that no Indian has even been prosecuted by both the state and federal courts in Kansas begs the question and makes light of the responsibility of the federal government in its relationship to Indian people. Congress cannot pass laws which leave Indian people victim to the threat of double prosecution. Moreover, the State of Kansas is not an arm of the federal government, the state is a separate sovereign.

This threat of double prosecution ceretainly does not work to the benefit of the Indians of Kansas and violates this first canon of statutory construction.

The second canon of construction provides that federal statutes should be construed so as to avoid implicit repeals. *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). The Tenth Circuit's interpretation of 18 U.S.C. section 3243 works a repeal of the Major Crimes Act, a statute passed for the benefit of Indians. As Petitioner has argued, if Congress desired to repeal or modify the Major Crimes Act as it applied to the Indians in Kansas, Congress could have done so and that intention would have been clearly stated in the language of 18 U.S.C. section 3243.

Since there is no clear expression of congressional intent in either the wording of 18 U.S.C. section 3243 or in its legislative history, and since ambiguous statutes must be interpreted in favor of Indians, the Kansas Act must be interpreted by this court as relinquishing criminal jurisdiction to the State of Kansas for misdemeanor offenses while retaining exclusive federal jurisdiction over major crimes.

In his amicus brief the Solicitor General cites an additional federal statute which granted criminal jurisdiction to New York, Act of July 2, 1948 ch. 809, 62 Stat. 1224, codified at 25 U.S.C. section 232 and urges this court to compare the New York statute to the Kansas Act. This statute differs from the jurisdictional grant to Kansas in that it lacks a proviso expressly preserving federal jurisdiction and therefore the case cited by the Solicitor General, *United States v. Cook*, 922 F.2d 1025 (2d Cir. 1991), cert. denied, 111 S.Ct. 2235 (1991) is irrelevant.

In the *Cook* case, the Indian defendants challenged their convictions under federal gambling statutes 15 U.S.C. section 1175 (1988), which prohibited the use and possession of gambling devices in Indian country. The defendants argued that New York State had exclusive jurisdiction under 25 U.S.C. Section 232. The Court was not called upon and indeed did not resolve the scope of New York's jurisdiction under the Major Crimes Act since federal gambling statutes are not crimes enumerated in the Act. The Court held:

> The plain language of the statute leads us to conclude that section 232 extended concurrent jurisdiction to the State of New York. If Congress intended by enacting 25 U.S.C. section to surrender all federal jurisdiction, it could have said so in 1948 when section 232 was enacted. That is exactly what it did in 1970 when it amended 18 U.S.C. section 1162 to give six states exclusive jurisdiction over criminal and private civil matters involving Indian reservations within the particular state.

The decision of the Second Circuit may well have been different were the court analyzing a stattue similar to the Kansas statute. Since the New York and Kansas statutes are not similar the two statutes cannot be compared and the Second Circuit's analysis of the New York statute should have no bearing on this case.

An analysis of the Major Crimes Act and the Kansas Act shows that Congress intended to retain exclusive criminal jurisdiction over the major crimes with the federal court.

B. The Legisltive History of 18 U.S.C. Section 3243 Supports Petitioner's Position.

The legislative history of 18 U.S.C. section 3243 shows the intent of Congress to confer criminal jurisdiction on the state of Kansas for misdemeanor crimes and retain exclusive jurisdiction over major crimes with the federal courts.

In determining whether the "the federal grant of criminal jurisdiction found in 18 U.S.C. section 3243

extended to state-law offenses that are also crimes enumerated in the Major Crimes Act," *Negonsott*, at 819, the Court of Appeals was required to analyze the legislative history of the Kansas Act because of the Act's ambiguity. The court found the statute ambiguous because the first sentence unambiguously conferred criminal jurisdiction on the state over "all types" of state crimes while the second sentence "appears intended to ensure that the congressional grant of jurisdiction to Kansas courts over state-law cirmes contained in the first sentence would not "deprive" the United States courts of its jurisdiction over federally-defined offenses committed by or against Indians on Indian reservations. The ambiguity exists because federal jurisdiction over major crimes committed by Indian "would otherwise be exclusive." *Negonsott*, at 820.

A careful analysis of the legislative history leaves little doubt that Congress intended to preserve exclusive federal jurisdiction over a Kansas Indian who committed one of the major crimes.

As indicated in the previous section the Kansas Act was significantly amended by the Congress before it was ultimately passed into law. The amendments deleted all references to concurrent jurisdiction and to modification of the Major Crimes Act. 86 Cong. Rec. 5596 (1940). The court of appeals found these amendments insignificant:

> The term "concurrent jurisdiction" was thus removed because it did not accurately describe the bill in any of its forms. Federal courts did not exercise jurisdiction over all state-law offenses, and therefore those courts wou'd not be sharing concurrent jurisdiction with Kansas over all crimes. Conversely, federal courts under the Major Crimes Act possessed exclusive jurisdiction over the crimes enumerated therein. At the time of its enactment, the Kansas Act was to confer concurrent jurisdiction only as to those crimes covered by the Major Crimes Act. As explained by the Secretary, Congress' decision to excise the word "concurrent" from the title of the Act was to clarify rather than to change its substance. Reference to modification of the Major Crimes Act was apparently dropped as unnecessary when the second sentence of the Kansas Act was added instead.

Negonsott, at 823.

However, as the court in *Youngbear*, at 813 stated:

> By deleting this language, the only intent which can reasonably be inferred to Congress was to preserve exclusive Federal jurisdiction over the major crimes.

Evidence of the intent of Congress to preserve exclusive jurisdiction is further indicated by the letter from Congressman Lambertson which shows that Congress did not intend to relinquish jurisdiction over the major crimes to the State of Kansas. This letter, in its entirety, states as follows:

> I want to urge that you recommend out of the committee H.R. 3048 with the requested change in language in one place. All parties are agreed on this bill—the Indians, the superintendent, the Indian agencies on the Kansas reservations, which are all in my district, and the people that are on and surround the reservations.
>
> This bill has been O'K.'d by the Indian office through the Indian Department and I understand by the Department of Justice and no objection found to it by the Budget. The Government here *relinquishes to the State full jurisdiction over the Indians for small offenses.* It will be in the interest of law and order and a unified law enforcement.
>
> I sincerely hope that the committee recommends the bill for passage.

H.R. Rep. No. 1999, 76th Cong., 3d Sess. at 1 (1940).

The Court of Appeals and the Solicitor General have dismissed this letter [1] by stating:

> It is also possible that Representative Lambertson understood the bill to confer "full" jurisdiction over small crimes occurring among Indians to fill the void left by the tribal courts, while conferring concurrent power to prosecute the types of crimes covered by the Major Crimes Act. If we give credence to Negonsott's interpretation we are at a loss to explain why it contravenes the memorandum and letter from the Secretary of the Interior which clearly evince an understanding that Kansas under the Act as amended could exercise criminal jurisdiction over all state-law crimes occurring on Indian land.

Negonsott, at 822.

The Kansas Act was the first to confer criminal jurisdiction on a state and in light of the Major Crimes Act, it is difficult to believe that reference to the most important part of the legislation would be missing from the Congressman's letter. The failure to refer to "major" as well as "small" offenses shows that Congress never intended to confer concurrent jurisdiction on the state courts over major crimes. And the reference to "unified law enforcement" can only mean the state prosecuting "small" offenses and the federal courts prosecuting major crimes.

Two other documents are part of the legislative history. One is a letter from then Acting Secretary of the Interior, E.K. Burlew and an undated memorandum submitted by the Department of the Interior enclosed with Mr. Burlew's letter. The court of appeals placed unwarranted emphasis on these two documents.

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[1] In the case of *Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas*, 787 F.2d 1435 (10th Cir. 1986), the Tenth Circuit held that this letter from Congressman Lambertson was the most persuasive evidence of congressional intent. 787 F.2d at 1440.

The court quoted extensively from the letter of Acting Secretary E.K. Burlew, H.R. Rep. No. 1999, 76th Cong., 3d Sess. 2 (1940).

> "The Secretary noted that federal jurisdiction over crimes concerning Indians on Indian land has been limited, leaving ' "some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts." ' House Report at 2. Because the state lacked jurisdiction over such offenses, maintenance of law and order depended on the tribal courts, which had not functioned on Kansas reservations for many years. To fill this void, and with the consent of the tribes concerned, the State courts had undertaken the punishment of offenses, including those covered by the federal statutes. The legality of this practice had been questioned, and the tribes had allegedly requested enactment of legislation to continue the state practice by a transfer of juridsiction to the State.

According to the Court of Appeals this report "reflects an understanding that the proposed legislation would legalize the State's assertion of complete criminal jurisdiction under state law over the Indian tribes without depriving the federal court of its more limited criminal jurisdiction by virtue of preexisting jurisdictional grants such as the Major Crimes Act. *Negonsott*, at 822.

Petitioner contends that the letter and memorandum from the Department of the Interior, dated March 16, 1940 refers to the original bill discussed in the previous section of this brief. This bill was drafted by the Interior Department and would have explicitly granted concurrent jurisdiction to the State of Kansas and would have explicitly amended the Major Crimes Act as it pertained to Indians residing on reservations in the State of Kansas. *Youngbear v. Brewer*, at page 813, no. 5. This contention is supported by the language found in the letter of memorandum. For example, the memorandum accompanying Secretary Burlew's letter speaks to the intention to con-

fer jurisdiction to Kansas over all criminal offenses, including those listed in the Major Crimes Act:

> The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes . . . The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable.

H.R. Rep. No. 1999, at 5 and S. Rep. No. 1532, at 4.

Additionally, the letter from Mr. Burlew makes it clear that the letter and memorandum are only referring to the bill as originally drafted:

> However, the bill, as now worded, does not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to 'relinquish concurrent jurisdiction' to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States but a case of conferring upon the State *complete* criminal jurisdiction, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law. (emphasis added.)

H.R. Rep. No. 1999, at 3 and S. Rep. No. 1523, at 2.

The letter and memorandum also reflect a very practical concern of the Department of the Interior, namely, the fervent desire of the Department that Congress assist it in abdicating its trust responsibility toward the Indians of Kansas by relinquishing that responsibility to the state:

> As the Indian Service is not now in a position to establish a law and order set-up on these four reservations, the superintendent is of the opinion that the maintenance of law and order will get into a precarious condition if the State authorities are not permitted to continue giving the Indians police protection.

H.R. Rep. No. 1999 at 5, S. Rep. No. 1523, at 4.

Petitioner's analysis of the legislative history of the Kansas Act is consistent with the analysis by Judge McManus in *Youngbear v. Brewer*. In that case, the defendant was a member of the Sac and Fox tribes. He was prosecuted by the State of Iowa for the crime of murder, one of the major crimes. The Iowa Supreme Court affirmed the conviction, rejecting Mr. Youngbear's argument that the courts of Iowa lacked jurisdiction to prosecute him. Since the law granting criminal jurisdiction to Iowa, Act of June 30, 1948, ch. 759, 62 Stat. 1161, Pub. L. No. 846, was exactly the same as the Kansas Act, Judge McManus analyzed the legislative history of the Kansas Act to determine congressional intent with regard to the Iowa Act. In his analysis of the legislative history of 18 U.S.C. section 3243, Judge McManus stated:

> Also pertinent to the legislative history of a statute whose operative language is identical with that of P.L. 846 except for the designation of the State of Kansas rather than Iowa. That statute . . . was cited as the model to which Pub. L. 846 could be compared. H.R. Rep. 2356 at 3. The original draft of the bill conferring jurisdiction on the State of Kansas, H.R. 3048, did state that concurrent jurisdiction was relinquished to the State, and further expressly provided that 18 U.S.C. section 548 (Federal Major Crimes Act as then codified) was modified accordingly. 86 Cong. Rec. 5576, 76th Cong. 3rd Sess. (May 6, 1940). This bill was rejected, and the substituted bill which was subsequently enacted did not contain either the term 'concurrent' or the clause modifying the effect of the Federal Major Crimes Act.

> By deleting this language, the only intent which can reasonably be inferred to Congress was to preserve exclusive Federal jurisdiction over the major crimes.
>
> Evidence of this intent also appears in a letter from Representative W.P. Lambertson, a Kansas congressman whose district was affected by the bill. The letter, appearing in the report of the House Committee on Indian Affairs, H.R. Rep. 1999 at 2, 76th Cong. 3rd Sess. (1940), states that 'The Government here relinquishes to the State full jurisdiction over the Indians for *small offenses.*

Youngbear v. Brewer, at pages 812-813.

Judge McManus dismissed the letter from Secretary Burlew, stating:

> Respondent cites a letter from then Acting Secretary of Interior which suggests that the bill would grant concurrent jurisdiction over the major crimes. H.R. Rep. 1999, 76th Cong., 3rd Sess. (1940). However, it appears that the letter refers to the original bill, which was drafted by the Interior Department and would have explicitly granted concurrent jurisdiction.

Id., at page 813, no. 5.

The legislative history of the Kansas Act shows without doubt that Congress intended to retain exclusive federal jurisdiction over the major crimes.

CONCLUSION

For the reasons stated above, the decision of the Tenth Circuit should be reversed.

Respectfully submitted,

PAMELA S. THOMPSON
325 Cutspring Road
Stratford, Connecticut 06497
(203) 375-3249
Counsel for Petitioner

No. 91-5397

In The

Supreme Court of the United States

October Term, 1992

EMERY L. NEGONSOTT,

Petitioner/Appellant,

vs.

HAROLD SAMUELS, WARDEN; and
ROBERT T. STEPHAN, ATTORNEY GENERAL
OF THE STATE OF KANSAS,

Respondents/Appellees.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF RESPONDENTS

ROBERT T. STEPHAN *
Attorney General of Kansas
JOHN W. CAMPBELL
Deputy Attorney General
Kansas Judicial Center
Topeka, Kansas 66612
(913) 296-2215

TIMOTHY G. MADDEN
Special Asst. Atty. Gen.
Kansas Department of Corrections
4th Floor
900 Jackson Street
Topeka, Kansas 66612
(913) 296-4508

Counsels for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether 18 U.S.C. § 3243 confers criminal jurisdiction on the State of Kansas to prosecute petitioner for the crime of aggravated battery, committed on an Indian reservation when that crime also falls within the scope of the Major Crimes Act, 18 U.S.C. § 1153.

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BRIEF OF RESPONDENTS

MAY IT PLEASE THE COURT:

The instant habeas corpus case is before this Court on a writ of certiorari to the United States Court of Appeals for the Tenth Circuit. For the reasons stated below, the respondents, Harold Samuels, Warden, and Robert T. Stephan, Attorney General for the State of Kansas, respectfully urge the Court to affirm the holding of the Tenth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the jurisdiction of the State of Kansas to prosecute a member of the Kickapoo Tribe pursuant to 18 U.S.C. § 3243 for the aggravated battery of another member of that Tribe, while on the Kickapoo Reservation. 18 U.S.C. § 3243 provides:

> "Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

The petitioner was convicted of having committed the state offense of aggravated battery in violation of K.S.A. 21-3414, which is defined as:

> "The unlawful touching or application of force to the person of another with intent to injure that person or another and which either: (a) Inflicts great bodily harm upon him; or (b) Causes any disfigurement or dismemberment to or of his person; or (c) Is done with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, dismemberment, or death can be inflicted."

The state crime of aggravated battery also falls within the scope of the Major Crimes Act, 18 U.S.C. § 1153, which provides:

> "(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

The predecessor to the current Major Crimes Act was the Act of Congress of March 3, 1885, § 9. This Act provided:

> "That immediately upon and after the date of the passage of this Act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian Reservation, shall be tried therefor in the same courts and in the-same manner, and shall be subject to the same penalties, as are all other persons charged

with the commission of the said crimes respectively; and said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above described crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian Reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The Federal Enclave Act as defined by 18 U.S.C. § 7 provides:

"The term 'special maritime and territorial jurisdiction of the United States', as used in this title, includes: (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, district, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or

concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

The term 'special maritime and territorial jurisdiction of the United States', as used in this title, includes:

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a force landing, until the competent

authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States."

The assimilation of state law for federal enclaves is provided for by 18 U.S.C. § 13, which provides:

"Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

The adaptation of state law for federal enclaves was extended to Indian country with some limitation by 18 U.S.C. § 1152:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive

jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

Eight years after the passage of the Kansas Act, 18 U.S.C. § 3243, Congress granted criminal jurisdiction to the State of Iowa, Act of June 30, 1948, Ch. 759, 62 Stat 1161, Pub.L. No. 846, which was modeled on the Kansas Act. It provides:

"That jurisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservations in that State to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of any Indian reservation: Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

Congress subsequent to the passage of 18 U.S.C. § 3243, enacted Public Law 280, Pub.L 83-280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, which provides:

"That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

1162 State jurisdiction over offenses committed by or against Indians in Indian country.

Sec. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community, that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property

in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section"

Public Law 280 was amended to included additional states as set out in 18 U.S.C. § 1162 which provides:

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian county listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.

California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction."

STATEMENT OF THE CASE

The petitioner, Emery L. Negonsott, was convicted of aggravated battery in the state District Court of Brown County, Kansas. The petitioner is a member of the Kickapoo Tribe and the victim of his crime likewise was a member of that tribe. The offense occurred on the Kickapoo reservation located in the State of Kansas. The petitioner was prosecuted in the state District Court pursuant to the grant of criminal jurisdiction by the United States to the State of Kansas in 18 U.S.C. § 3243.

The petitioner contends that his prosecution for the state crime of aggravated battery in the state District Court of Brown County, Kansas was unlawful since the crime of aggravated battery is one of the enumerated crimes prohibited by the Major Crimes Act, 18 U.S.C. § 1153. Petitioner's argument is that only the United States District Court for the District of Kansas had jurisdiction to prosecute him for his criminal actions committed on the Kickapoo reservation.

The petitioner's state conviction has been upheld by the Kansas Supreme Court, *State v. Negonsott*, 239 Kan. 127, 642 P.2d 585 (1986), (JA. 3-10); the United States District Court for the District of Kansas, *Negonsott v. Harold Samuels and the Attorney General of the State of Kansas*, 696 F.Supp. 561 (D.Kan. 1988), (JA. 11-16); and the United States Court of Appeals for the Tenth Circuit, *Negonsott v. Samuels, et al.*, 933 F.2d 818 (10th Cir. 1991), (JA. 17-30).

SUMMARY OF ARGUMENT

Congress possesses plenary authority over Indian tribes. Without Congressional authorization neither the federal government nor the various states have jurisdiction to prosecute crimes committed by or against Indians in Indian country. Congress, however, through its plenary power can legislate for the prosecution of offenses committed by or against Indians in Indian country in any manner that it deems appropriate.

Congress, by enactment of 18 U.S.C. § 3243, granted to the State of Kansas, jurisdiction to prosecute all crimes committed on reservations located in Kansas irrespective of the ethnicity of the victim or the offender. The 1940 passage of 18 U.S.C. § 3243 was the first of a series of congressional enactments providing for the prosecution by states, criminal offenses committed in Indian country.

The retention by 18 U.S.C. § 3243 of the jurisdiction already possessed by federal courts to prosecute crimes that fall within the scope of 18 U.S.C. §§ 1152 and 1153 does not restrict the complete criminal jurisdiction granted to the State of Kansas. The granting of complete jurisdiction to Kansas with a retention of a limited concurrent jurisdiction in the federal courts for the prosecution of crimes that fall within the scope of §§ 1152 and 1153 resulted from Congress' realization that is was desirable for the State of Kansas to have the authority to prosecute crimes that were already within the jurisdiction of the federal courts as well as crimes that were outside of the federal court's jurisdiction in order to provide effective law enforcement, while if the need arose in a particular situation, federal courts could exercise their

jurisdiction. The success of 18 U.S.C. § 3243 in providing effective law enforcement to the residents of reservations in Kansas was part of the natural progression that eventually resulted in Congress withdrawing the federal courts from criminal prosecutions entirely in states granted jurisidiction by Public Law 280.

ARGUMENT

WHETHER 18 U.S.C. § 3243 CONFERS CRIMINAL JURISDICTION ON THE STATE OF KANSAS TO PROSECUTE PETITIONER FOR THE CRIME OF AGGRAVATED BATTERY, COMMITTED ON AN INDIAN RESERVATION WHEN THAT CRIME ALSO FALLS WITHIN THE SCOPE OF THE MAJOR CRIMES ACT, 18 U.S.C. § 1153

I. AUTHORITY OF CONGRESS TO DESIGNATE CRIMINAL JURISDICTION OVER INDIAN COUNTRY.

In the 109 years following this Court's decision in *Ex Parte: In the Matter of Kang-Gi-Shun-Ca; Otherwise Known as Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883), criminal jurisdiction on Indian reservations has been described as a "Jurisdictional Maze".[1] In 1940, Congress by passage of 18 U.S.C. § 3243, also referred to as the "Kansas Act", resolved the labyrinth issue of criminal jurisdiction over Indian reservations in Kansas by granting to Kansas criminal jurisdiction to the same extent as

[1] Clinton, "Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze." 18 Ariz L. Rev. 503 (1976).

its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

Congress by enactment of the "Kansas Act", simplified the jurisdictional maze that had evolved since the decision of *Crow Dog*, (supra). But for the passage of jurisdictional grants such as 18 U.S.C. § 3243 and 18 U.S.C. § 1162 to states, the jurisdiction for the prosecution of crimes in Indian country depends on a number of factors.[2] The prosecution of offenses committed on reservations located in states that have not been granted specific criminal jurisdiction by Congress depends on the nature of the crime, the ethnicity of the victim and perpetrator, (even the tribal affiliation), and the situs of the offense.

States are vested with jurisdiction over criminal offenses for all crimes regardless of the race of the participants if the offense is committed outside of Indian country. *De Marrias v. State*, 319 F.2d 845, 846 (8th Cir. 1963); *In re Wolf*, 27 F. 606, 610 (D.C. Ark. 1886); *Pablo v. People*, 23 Colo. 134, 135, 46 P. 636, 637 (1896); *Hunt v. State*, 4 Kan. 51, 55-56 (1866); *State v. Spotted Hawk*, 22 Mont. 33, 44, 55 P. 1026, 1028 (1899); *State v. Williams*, 13 Wash. 335, 339, 43 P. 15, 16 (1895); *People ex rel. Schuyler v. Livingstone*, 123 Misc. 605, 611-12, 205 N.Y.S. 888, 894 (Sup. Ct. 1924).

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[2] Congress has granted other states jurisdiction over offenses committed on Indian country; The Iowa Act, Act of June 30, 1948, ch. 759, 62 Stat. 1161; the North Dakota Act, Act of May 31, 1946, ch. 279, 60 Stat. 229; New York Act, Act of July 2, 1948, ch. 809, 62 Stat. 1224, codified at 25 U.S.C. 232; and California, Act of Oct. 5, 1949, ch. 604, 63 Stat. 705.

Likewise, states have jurisdiction for the prosecution of crimes committed on reservations by non-Indians against other non-Indians. *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1881), *Draper v. United States*, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896), and *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946).

Jurisdiction in the federal courts pursuant to 18 U.S.C. § 1153 requires only that the perpetrator of one of the enumerated major crimes be Indian, the race of the victim is irrelevant. [18 U.S.C. § 1153, and *United States v. John*, 437 U.S. 634, 57 L.Ed. 2d 489, 98 S.Ct. 2541 (1978)].

Jurisdiction by the federal courts for non-major crimes is dependent on a diversity of the race of the offender and the victim. [18 U.S.C. § 1152; and *Williams v. United States*, 327 U.S. 711, 90 L.Ed. 962, 66 S.Ct. 778 (1946)]. If the victim and the offender of a non-major crime are not both members of the same tribe, the federal court has jurisdiction. *Duro v. Reina*, 495 U.S. 676, 109 L.Ed.2d 693, 110 S.Ct. 2053 (1990). Finally, if both the victim and the offender of a non-major crime are members of the same tribe, neither the federal courts nor the state has jurisdiction. 18 U.S.C § 1152 and *Duro v. Reina*, supra.

Finally, the resolution of the issue of what constitutes "Indian Country" is no easy task. See *United States v. John*, 437 U.S. 646, 57 L.Ed.2d 489, 98 S.Ct. 2541 (1978) for an illustration of the complexity involved in determining

whether the situs of the offense lies in Indian country.[3] Needless to say, a system as described above, is not an efficient or effective mechanism for providing law enforcement protection to a community, and was addressed in the legislative history of 18 U.S.C. § 3243. However, for crimes committed on Indian reservations in Kansas it is no longer necessary to determine the race of the suspect and the victim, nor determine whether the situs of the crime is an allotment or reservation property in order to determine whether the crime must be prosecuted in state or federal court.

Since the "Kansas Act" was the first Congressional attempt to resolve the jurisdictional maze by granting to a state criminal jurisdiction, 18 U.S.C. § 3243 provided that the Federal government, if the need arose could also exercise its jurisdiction. (cf. 18 U.S.C. § 1162).

The meaning of 18 U.S.C. § 3243 and its interplay with the Major Crimes Act, 18 U.S.C. § 1153, is clear when examined in the historical context of criminal jurisdiction in Indian Country. The history of the relationship between the federal government and the indigenous Indian Nations is tale of conflict not only between non-

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[3] The issue of whether land lies within a reservation has resulted in conflicting decisions in *Ute Indian Tribe v. Utah*, 521 F.Supp. 1072 (D. Utah. 1981). On appeal 716 F.2d 1298, en banc 773 F.2d 1087 (10 Cir. 1985), cert . denied, 479 U.S. 994 (1986); and *State of Utah v. Perank*, 191 Utah Adv. Rep. 5 (July 17, 1992) and *State of Utah v. Hagen*, 191 Utah Adv. Rep. 26 (July 17, 1992). This series of cases have resulted in four determinations concerning whether the same property lies within the reservation boundaries.

Indian and Indian, but also between the federal government and the various states, and between the Executive and Judicial branches of the Federal Government.[4] The supremacy of Congress over the states regarding Indian matters was resolved in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832).

After the resolution of the authority of states vis a vie Congress in respect to Indian country, this Court in 1883, was presented with the habeas action arising from a murder conviction of a member of the Sioux Nation for the murder of another Sioux. *Crow Dog*, supra. The murder was committed in Indian Country and the petitioner was sentenced by the District Court for the Dakota Territory. This Court held the Territorial Court was without jurisdiction to try the indictment and that the conviction and sentence were void.

Congress responded to the Court's decision in *Crow Dog* (supra) by enactment of the Major Crimes Act, found at Act of Congress of March 3, 1885, § 9. This Act provided:

> "That immediately upon and after the date of the passage of this Act all Indians committing

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[4] The conflict between states, the President and this Court is amply demonstrated in *Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831). President Jackson in his response to the petition of the Cherokee Nation for protection from the state of Georgia, stated, "that the President of the United States has no power to protect them against the laws of Georgia". (*Cherokee Nation* at page 28). Furthermore, the state of Georgia in defiance of a writ of error allowed by Chief Justice Marshall of this Court executed an individual named Corn Tassel. (*Cherokee Nation* at page 29).

against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian Reservation, shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes respectively; and said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above described crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian Reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The Major Crimes Act of March 3, 1885, § 9 is the predecessor of 18 U.S.C. § 1153 and is substantially identical to the current Major Crimes Act. The Major Crimes Act of 1885 was examined by this Court in regard to an indictment of two members of the Hoopa Valley Indian Reservation pursuant to the Major Crimes Act of 1885 for the murder of another member of that reservation. *United States v. Kagama*, 118 U.S. 375, 30 L.Ed. 228, 6 S.Ct. 1109 (1886).

In *Kagama*, this Court held that Major Crimes Act of 1885 granted jurisdiction to the federal government to prosecute Indians that commit the enumerated crimes

against Indians and non-Indians. In reaching this conclusion, this Court pointed out the authority to govern Indian tribes is vested in Congress.

The lesson to be drawn from *Crow Dog* and *Kagama* is that while Congress possesses plenary authority over Indian Tribes, criminal jurisdiction of even the federal courts must be granted by Congress.

The plenary power of Congress to govern Indian Tribes is uncontroverted. This Court, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 51 L.Ed.2d 660, 97 S.Ct. 1361 (1977), was presented with a controversy involving whether the Rosebud Sioux Reservation could be diminished in size by acts of Congress when a treaty provision requiring approval of three-quarters of the members of the tribe had not been met. In ruling that acts of Congress could reduce the size of the reservation, this Court stated:

> "Because of the reasons hereafter set forth in greater detail, we conclude that although the Acts of 1904, 1907, and 1910 were unilateral Acts of Congress without the consent of three-quarters of the members of the tribe required by the original treaty, that fact does not have any direct bearing on the question of whether Congress by these later Acts did intend to diminish the Reservation boundaries." At page 587.

This Court in deciding *Rosebud*, supra, relied on *Lone Wolf v. Hitchcock*, 187 U.S. 553, 47 L.Ed. 299, 23 S.Ct. 216 (1903), "Which held that Congress possessed the authority to abrogate unilaterally the provisions of an Indian treaty." *Rosebud*, supra, at 588.

II. RETENTION OF JURISDICTION OVER MAJOR CRIMES BY THE FEDERAL GOVERNMENT DOES NOT LIMIT THE JURISDICTION GRANTED TO KANSAS.

The course of history concerning the relationship between Indian tribes, states and the Federal government is replete with attempts by states, and the executive branch of the federal government to unilaterally assert authority over Indian tribes without the authority of Congress. This Court's opinions in *Crow Dog*, supra, and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed 483 (1832) clearly prohibit state and federal involvement in Indian affairs absent Congressional authority. This Court's annulment of Georgia's prosecution of a white missionary who entered the Cherokee Nation in contravention of Georgia law is but one example of when this Court has spoken of the exclusive authority of Congress to govern Indians. (*Worcester*, supra).[5]

In *Worcester*, this Court stated:

> "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the

[5] President Andrew Jackson's statement that, "John Marshall has made his decision; now let him enforce it", was made in response to the opinion of Chief Justice Marshall in *Worcester v. Georgia*. "Politics as Law: The Cherokee Cases", William F. Swindler.

> United States and this nation is, by our Constitution and laws, vested in the government of the United States." *Worcester* at page 501.

The exclusion of states from asserting jurisdiction over Indian tribes has been uniformly applied by Courts. This Court has held that federal jurisdiction over those offenses committed by Indians that are covered by 18 U.S.C. § 1153 (the Major Crimes Act) is exclusive of state jurisdiction. *United States v. John*, 437 U.S. 634, 651, 57 L.Ed.2d 489, 98 S.Ct. 2541 (1978); see also *Seymour v. Superintendent*, 368 U.S. 351, 359, 7 L.Ed.2d 346, 82 S.Ct. 424 (1962). The Court has also repeatedly stated (albeit in dictum) that federal jurisdiction over other crimes under 18 U.S.C. § 1152 likewise is exclusive of state jurisdiction. *Williams v. United States*, 327 U.S. 711, 714, 90 L.Ed. 962, 66 S.Ct. 778 (1946); *Williams v. Lee*, 358 U.S. 217, 220, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-471, 58 L.Ed.2d 740, 99 S.Ct. 740 (1979). A number of state courts have held likewise. See *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989); *Arguette v. Schneckloth*, 351 P.2d 921 (Wash. 1960); *In re Application of Denetclaw*, 320 P.2d 697 (Ariz. 1958); *State v. Kuntz*, 66 N.W.2d 531 (N.D. 1954); see also *State v. Warner*, 379 P.2d 66, 68-69 (N.M. 1963) (dictum); *State v. Jackson*, 16 N.W.2d 752, 754 (Minn. 1944) (dictum); 30 Op. Or. Att'y Gen. 11 (1960).

However, as was pointed out by this Court in *Kagama*, supra, in its analysis of the 1885 version of the Major Crimes Act providing criminal jurisdiction to federal courts,

> "[t]he statute itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress has *done* this, and *can* do it with regard to all offenses relating to matters to which the federal authority extends. (Emphasis in the original). *United States v. Kagama*, 118 U.S. 228, 231.

Likewise, the language of 18 U.S.C. § 1153 contains no limitation upon the powers of a state. If Congress determines that it is desirable to grant criminal jurisdiction to a state and retain concurrent jurisdiction in the federal government over major crimes, the provisions of 18 U.S.C. § 1153 would not be amended.

The authority of Congress over Indian affairs is plenary. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 51 L.Ed.2d 660, 97 S.Ct. 1361 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 47 L.Ed. 299, 23 S.Ct. 216 (1903). There is nothing to prohibit Congress from granting to the State of Kansas complete jurisdiction over all crimes committed against or by Indians within the boundaries of the State, while retaining concurrent jurisdiction by the Federal Government to prosecute offenses defined by 18 U.S.C. § 1153.

III. CONGRESS INTENDED THAT KANSAS EXERCISE COMPLETE CRIMINAL JURISDICTION OVER CRIMES COMMITTED ON INDIAN RESERVATIONS WITHIN THE STATE.

The 1940 passage of 18 U.S.C. § 3243 was the first time that Congress granted any type of criminal jurisdiction over Indian reservations to a state. It stands to reason that due to the experimental nature of the granting of jurisdiction to a state over crimes committed by Indians or against Indians on reservations, Congress intended to retain an alternative for criminal prosecution in the event the state of Kansas failed to carry out its responsibility of providing police protection to the residents of the reservations within its borders. This alternative is provided for by the retention of the jurisdiction granted to federal courts by 18 U.S.C. §§ 1153 and 1152.

It was not until the passage of Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, thirteen years after the enactment 18 U.S.C. § 3243, that Congress determined criminal jurisdiction could be granted to selected states with the complete withdrawal of the federal government from the arena of criminal prosecutions. Congress' decision to retain federal court jurisdiction over a handful of crimes when it enacted 18 U.S.C. § 3243 does not entail that such retention was at the exclusion of Kansas courts. Petitioner's argument that retention of 18 U.S.C. § 1153 federal court jurisdiction negates the clear language of a granting of complete criminal jurisdiction to the State of Kansas is without merit.

Petitioner's argument ignores the fact that the "exclusivity" of the criminal jurisdiction of the federal

courts over Indian reservations is not due to any inherent power of federal courts but is rather due to the policy decision of Congress to place jurisdiction with the federal courts and the absence of a Congressional grant of jurisdiction to the states. The absence of a Congressional granting of jurisdiction to a state prior to 1940 has no bearing in the instant case in light of the clear intent expressed by the provision of 18 U.S.C. § 3243 that,

> "Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State."

The proviso of 18 U.S.C. § 3243 that,

> "This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

does not serve to create an exclusive jurisdiction in the federal courts for offenses under 18 U.S.C. § 1153. The entire legislative history of 18 U.S.C. § 3243 indicates that the retention of federal court jurisdiction was intended to provide the alternative of a limited concurrent federal jurisdiction in the event the state of Kansas failed to prosecute a crime defined by both Kansas state law and the Major Crimes Act and did not limit the total jurisdiction granted to Kansas.

The issue of whether the retention of jurisdiction in the federal courts provided by the second paragraph of

18 U.S.C. § 3243 constituted a limitation on the language of the first paragraph granting complete jurisdiction to Kansas has been litigated in two United States Circuit Courts and the Supreme Court of Kansas.

The Eighth Circuit addressed the applicability of the jurisdictional grant to the state of Iowa, 62 Stat. 1224, Ch. 809 which was modeled after the Kansas grant. The Eighth Circuit in *Youngbear v. Brewer*, 549 F.2d 74 (8th Cir. 1977) found that the state of Iowa did not possess jurisdiction over major crimes. The *Youngbear* decision was initially applied by the Kansas Supreme Court in *State v. Mitchell*, 231 Kan. 142, 642 P.2d 981 (1982). The Kansas Supreme Court, however, when presented the issue again rejected the analysis of *Youngbear* and reversed the holding of *Mitchell* in *State v. Negonsott*, 239 Kan. 127, 716 P.2d 585 (1986). (*State v. Negonsott*, was the final state court decision that gave rise to petitioner's federal habeas action on certiorari to this court and is found at JA 3-10).

The Tenth Circuit Court of Appeals in *Iowa Tribe of Indians v. State of Kansas*, 787 F.2d 1434 (10th Cir. 1986), also had occasion to review the interplay between 18 U.S.C. § 3243 and the General Crimes Act of 18 U.S.C. § 1152. The Tenth Circuit in *Iowa Tribe of Indians* did not address the interplay between the Major Crimes Act, 18 U.S.C. § 1153 and the Kansas Act 18 U.S.C. § 3243 since the crime involved in that case was gambling which is not within the scope of the Major Crimes Act. However, the Tenth Circuit in *Iowa Tribe*, found that Congress by passage of 18 U.S.C. § 3243 did intend to grant to the State of

Kansas jurisdiction over non-major crimes that had previously been within the exclusive province of federal jurisdiction by virtue of the Assimilative Crimes Act, 18 U.S.C. § 13, and the General Crimes Act, 18 U.S.C. § 1152.

Without a Congressional creation of jurisdiction to be held concurrently by the State of Kansas and the Federal Government through enactment of 18 U.S.C. § 3243, jurisdiction over interracial non-major crimes is held exclusively by the Federal Government. *Williams v. United States*, 327 U.S. 711, 90 L.Ed. 962, 66 S.Ct. 778 (1946). Since the Kansas Act 18 U.S.C. § 3243 did not amend the application of either the Major Crimes Act (18 U.S.C. § 1153) or the General Crimes Act (18 U.S.C. § 1152), to the reservations located in Kansas, petitioner's agrument that Kansas can not prosecute crimes that fall within the scope of the Major Crimes Act would equally apply to crimes that are within the scope of the General Crimes Act. The Tenth Circuit Court of Appeals in *Iowa Tribe of Indians v. State of Kansas*, 787 F.2d 1434 (10th Cir. 1986) held that Kansas was granted concurrent jurisdiction to prosecute crimes that fell within the scope of the General Crimes Act. The same concurrent jurisdictional authority was intended by Congress in regard to major crimes.

Contrary to the holding of the Tenth Circuit in the *Iowa Tribe of Indians* and its decision in the instant case, the Eighth Circuit in *Youngbear* (549 F.2d 74) found that 18 U.S.C. § 3243 did not provide for any type of concurrent jurisdiction by the State of Kansas and the Federal Courts.

The United States District Court in *Youngbear*, (415 F.Supp. 807) in discussing 18 U.S.C. § 3243, misinterpreted the significance of the fact that the original bill to extend jurisdiction to the State of Kansas was entitled "Relinquishing Concurrent Criminal Jurisdiction to the State of Kansas in Indian Cases". That Court reasoned that since the term "concurrent" was struck from the bill, it was Congress' intent to retain exclusive jurisdiction of Major Crimes in the Federal Court. This conclusion is not supported by the Congressional intent as shown by the Senate and House of Representatives Committee Reports. 76th Congress, 3rd Session, Senate Report 1523; 76th Congress 3rd Session, House Report 1999. (Appendixes to Respondents' Brief, "A" and "B" respectively).

These reports reveal that the original title of the act was not changed for the purpose of establishing exclusive federal jurisdiction, but rather, was changed due to the realization that the federal government had not assumed jurisdiction over all crimes in Indian Country and that it would be improper to say Kansas had concurrent jurisdiction with the federal government when Congress was delegating jurisdiction to Kansas that had not been given to federal courts. In other words, inclusion of the term "concurrent" was erroneous because the statute conferred broader jurisdiction on the state than the federal government actually exerted itself.

> "However, the bill, as now worded, does not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to 'relinquish concurrent jurisdiction' to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes,

whether major or minor, defined by State law. *Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining,* however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law.

In order that the bill may more accurately reflect the legal situation I propose that the title of the bill be changed to read: 'To confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations,' and that all after the enacting clause of the bill be stricken out and the following substituted:

'That jurisdiction is hereby conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State: Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations'." Senate Report 1532, (App. A at A5-A6). (Emphasis added.)

The Committee in the House had the same opinion. House Report 1999 (App. B at B6).

It is also significant that Congress realized that Kansas had on its own addressed the lack of law enforcement

on reservations by maintaining criminal prosecutions.[6] Since the legality of Kansas' assumption of jurisdiction without Congressional authorization was open to serious question, just as was Georgia's actions in *Worcester,* supra, the purpose of § 3243 was to authorize the historic practice of Kansas.

> "With the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, *including those covered by Federal statutes.* The legality of this practice being questioned recently, the tribal councils of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance by a transfer of jurisdiction to the State." Senate Report 1523, (App. A at A3); House Report 1999, (App. B at B4). (Emphasis added).

These Congressional reports indicate that federal enforcement of federal criminal law had been unsatisfactory on the Indian reservations in Kansas. In supporting the bill as amended and passed, both the Senate and

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[6] In 1940, 154 Indians resided in Brown County, Kansas. United States Department of Commerce, Sixteenth Census of the United States: 1940, Vol II, table 25. In 1980, the Indian census for Brown County, Kansas was 89. Census of Population; Characteristics of American Indians by Tribes and Selected Areas: 1980, volume 2, PC80-2-1C, page 124, Issued September 1989 U.S. Department of Commerce. The effectiveness and efficiency of either the tribe or the federal government in providing law enforcement protection to such a small group of individuals when state law enforcement is readily available supports Congress's decision to permit Kansas to exert jurisdiction for the protection of that community.

House committees stated that Kansas should have criminal jurisdiction over offenses currently provided for by federal law as well as those crimes not addressed by federal statute.

> "The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes; the Indians desire that they continue to do so; and a division of jurisdiction with respect to particular crimes based upon the place of their commission is rendered undesirable by the mutual interspersion of restricted and unrestricted holdings. The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in *any particular instance* where this course may be deemed advisable.
>
> Accordingly, the enactment of S. 372, amended as proposed in the report of this department, appears to offer the best solution for the present undesirable situation." House Report 1999, (App. B at B12); Senate Report 1523, (App. A at A11). (Emphasis added).

It is clear that Congress, by providing that the federal government retain the jurisdiction that it had, did not intend that such retained jurisdiction would result in the exclusion of Kansas jurisdiction. Congress wished to remedy the lack of enforcement on the part of the Federal Government by passage of 18 U.S.C. § 3243. Not only does the legislative history of the Kansas Act contradict

the rationale of *Youngbear*, the history of the Iowa jurisdictional grant also clearly points out that the jurisdictional grant to Kansas and Iowa were total.

> "This bill follows the language of the act of June 8, 1940 (54 Stat. 249) which conferred on the State of Kansas criminal jurisdiction over the four Indian reservations in that State. Reports received are to the effect the act is working very satisfactorily in Kansas. This bill is also similar to the Act of May 31, 1946 (60 Stat. 229) which conferred on the State of North Dakota criminal jurisdiction over the Devils Lake Indian Reservation. That act is also working satisfactorily. *While under this bill the State officers and the State courts will have jurisdiction over all offenses, the proviso reserves a right in the Federal court to exercise jurisdiction in the class of cases indicated. In practice, the chances are that most cases will be handled in the State courts. This is understood to be the practice in Kansas*". Senate Report 1490, 80th Congress 2nd Session. (Emphasis added).

Congress has simplified the jurisdictional maze regarding crimes committed on Indian reservations. In order to determine the applicability of the Major Crimes Act now codified at 18 U.S.C. § 1153, an analysis of the race of the defendant, the victim and a title search of the site of the offense is necessary. To avoid this confusion in an effort to provide all persons including Indians with effective police protection, Congress enacted a series of jurisdictional grants to selected states. Beginning with the Kansas Act in 1940 and shortly thereafter with the Act of May 31, 1946 (60 Stat. 229, Ch. 279) Devils Lake Indian Reservation, North Dakota; Act of June 30, 1948 (62 Stat. 1161, Ch. 759), Sac and Fox Indian Reservation, Iowa; Act

of July 2, 1948 (62 Stat. 1224, Ch. 809), New York; Act of October 5, 1949 (63 Stat. 705, Ch. 604), Aqua Caliente Indian Reservation, California; Congress granted to specific states jurisdiction over criminal offenses committed on Indian reservations. Finally, Congress in 1953, thirteen years after Kansas had been granted jurisdiction under 18 U.S.C. § 3243, enacted Public Law 83-280, ch. 505, 67 Stat. 588 which is now codified at 18 U.S.C. § 1162. With the passage of 18 U.S.C. § 1162, Congress removed the federal system from criminal prosecutions in the States that were granted jurisdiction under that statute. This legislative progression clearly shows that initially Congress intended to share concurrent jurisdiction over major crimes with Kansas and eventually removed the federal government from major crime prosecution entirely in Public Law 280 states.

An argument that since Kansas is not one of the States granted exclusive jurisdiction under 18 U.S.C. § 1162 is irrelevant. Congress by passage of 18 U.S.C. § 3243 intended that if the need arose in any particular instance where federal prosecution was advisable that course of action would still be available. House Report 1999, (App. B at B12); Senate Report 1523 (App. A at A11). Since Kansas was the first state to be granted criminal jurisdiction, it was prudent for Congress to retain federal court jurisdiction if needed.

The canon of construction that laws must be liberally construed to favor Indians and not to their prejudice does not dictate that 18 U.S.C. § 3243 must be interpreted as excluding from Kansas jurisdiction over Major Crimes. This Court in *Andrus v. Glover Const. Co.*, 446 U.S. 608, 64 L.Ed.2d 548, 100 S.Ct. 1905 (1980) stated, " . . . although

the 'rule by which legal ambiguities are resolved to the benefit of the Indians' is to be given the broadest possible scope '[a] canon of construction is not a license to disregard clear expressions of congressional intent' ", at page 619. The legislative history of 18 U.S.C. § 3243 is clear in that Congress intended to grant to the State of Kansas complete, albeit not exclusive, jurisdiction over Indian crimes and that federal courts if the need should arise in any particular case could exercise its jurisdiction over major crimes. House Report 1999, (App. B at B12); Senate Report 1523 (App. A at A11).

It must also be pointed out that in light of the Congressional findings set out in the legislative history of 18 U.S.C. § 3243, an interpretation of 18 U.S.C. § 3243 which limits criminal jurisdiction on the part of Kansas does not benefit the people that reside on reservations in Kansas. Denial of state police protection to the reservation when the Tribal Councils of the four Kansas tribes had recommended to Congress that legislation be enacted to legitimize the historic practice of state prosecution of crimes already covered by federal statute as found in the legislative history would not benefit the residents of the reservation that are the victims of crime.

In addition to the benefit provided to the members of Tribes located in Kansas, complete criminal jurisdiction by Kansas is not prejudicial to Indian criminals. It is of import that petitioner makes no claim that he did not receive a fair trial in the District Court of Brown County, Kansas. Furthermore, application of 18 U.S.C. § 3243 to crimes that also fall under the Major Crimes Act does not unjustly impact Indian defendants by subjecting them to the potential of being prosecuted by two jurisdictions.

The application of a double jeopardy bar in the context of an Indian reservation was addressed by this Court in *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079 (1978). In *Wheeler*, a member of the Navajo Tribe was prosecuted by the Tribe for contributing to the delinquency of a minor and the defendant was also indicted for violating the Major Crimes Act for statutory rape. In *Wheeler*, the dual prosecution was not barred because both the Federal and Tribal government possessed independent sovereign powers to prosecute crimes. However, in the case now pending before this Court, Kansas' jurisdiction is granted by Congress and therefore Kansas, as far as Indian jurisdiction is concerned, is only an arm of the Federal Government.

Successive prosecutions by nominally different prosecuting entities are barred if the prosecuting jurisdiction emanates from the same sovereignty. *Wheeler*, at page 318. Here, unlike in *Wheeler*, Kansas has no jurisdiction but for 18 U.S.C. § 3243.

Finally, an examination of the criminal jurisdictional maze that existed prior to the "Kansas Act" demonstrates that the grant of complete jurisdiction to the state of Kansas constitutes no greater interjection of non-Indian jurisdiction on reservation lands than would exist under petitioner's argument for limited jurisdiction and points out that the jurisdiction that petitioner contends was transferred to Kansas is truly insignificant in addressing the problems identified by Congress.

The Major Crimes Act (18 U.S.C. § 1153) provides for the prosection of major crimes committed by Indians against Indians or non-Indians, removing the jurisdiction

to prosecute those crimes from tribes. The General Crimes Act (18 U.S.C. § 1152) provides for the prosecution of interracial crimes committed by Indians against non-Indians or vice versa. States already have jurisdiction to prosecute non-Indians for crimes committed against non-Indians on reservations. The remaining crimes committed on reservations not covered by federal or state jurisdiction are only minor crimes committed by Indians against Indians of the same tribe; the jurisdiction for the prosecution of those crimes had been within the jurisdiction of tribes. Ironically, jurisdiction over intra-tribal minor crimes is the only jurisdiction contended by petitioner to have been granted by 18 U.S.C. § 3243 to the State of Kansas.

Petitioner must concede that even under his view of the scope of 18 U.S.C. § 3243, Kansas would be permitted to prosecute crimes that had been reserved for disposition by the tribe itself thus leaving the only issue as whether the federal courts or state courts of Kansas can prosecute crimes under §§ 1152 and 1153. In either case, Indian criminals will be prosecuted by a non-tribal jurisdiction. A limited view of the jurisdiction granted to Kansas by Congress would do nothing to remedy the problems so eloquently described by the legislative history in determining whether the federal courts have jurisdiction in the first place.

In addition to the cannon of construction that ambiguities be resolved to the benefit of the tribes, this Court is familiar with the judicial principle that legislative acts are to be interpreted in the manner that gives meaning to all of the statute's language. *Moskal v. United States*, 498 U.S. 103, 112 L.Ed.2d 449, 111 S.Ct. 461 (1990); *Colautti v.*

Franklin, 439 U.S. 379, 392, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979); and *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 86 L.Ed.2d 168, 105 S.Ct. 2587 (1985). The respondents' interpretation that 18 U.S.C. § 3243 granted to the state of Kansas complete jurisdiction with a retention of concurrent jurisdiction already possessed by the federal courts gives vitality to all of the language of that act. In *Mattz v. Arnett*, 412 U.S. 481, 37 L.Ed.2d 92, 93 S.Ct. 2245 (1973), this Court looked to the language and purpose of an act as well as the historical background, including the reports from the Interior Department in order to determine the status of a reservation. Likewise in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 51 L.Ed.2d 660, 97 S.Ct. 1361 (1977), this Court gave weight to language proposed by the Secretary of Interior incorporated in legislation for the interpretation of Congressional intent.

In the present case the legislative history is clear in identifying 1) the gap in federal law enforcement jurisdiction whereby,

> "[f]ederal criminal statutes applicable to Indian reservations are limited in their scope, particularly with respect to injuries inflicted by one Indian upon the person or property of another Indian, and leave some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts." Senate Report 1523 (App. A at A3); House Report 1999 (App. B at B3);

2) the historical practice of the state of Kansas "undertaking the trial and punishment of offenses committed on these reservations, including those covered by Federal

statutes." (App. A at A3) and (App. B at B4); 3) the desire of Tribes located in Kansas for enactment of legislation authorizing the state of Kansas to continue its practice of prosecuting offenses including those covered by federal statute. (*Id*); 4) the difficulty in determining what constituted reservation land due to the interspersal of unrestricted patents among most of the allotted lands. (App. A at A4) and (App. B at B4); and 5) the intent of Congress to grant to the state of Kansas complete criminal jurisdiction while retaining the potential for

> "prosecution in the Federal courts of those offenses which are now open to such prosecution. . . . in any particular instance where this course may be deemed advisable." Senate Report 1523 (App. A at A11); House Report 1999 (App. B at B12).

All of the concerns identified by the Department of Interior regarding criminal jurisdiction over reservations in Kansas are remedied by the respondents' interpretation of 18 U.S.C. § 3243. The language proposed by the Department of Interior whereby Kansas would have complete criminal jurisdiction while retaining the federal courts limited jurisdiction if the need arose was adopted in its entirety by Congress in passage of 18 U.S.C. § 3243.

In Conclusion, the State of Kansas was the first state to be given jurisdiction by Congress over crimes committed on reservation lands. Congress saw the clear need for this legislation to meet the law enforcement needs of the tribes in Kansas. Since this was the first time that Congress had embarked upon the course of permitting a state to be involved in the prosecution of crimes on a reservation, Congress wanted to insure that in any particular case if the need arose, the federal government retained its

authority. Therefore, Congress intended that 18 U.S.C. § 3243 grant to Kansas complete jurisdiction over all crimes with the retention on the part of the federal courts its limited jurisdiction. Years later as the success of the Kansas experiment became clear, Congress through the passage of Public Law 280 abdicated the role of the federal courts entirely in those states that were granted jurisdiction pursuant to Public Law 280. Therefore, the respondents pray the decision of the Tenth Circuit Court of Appeals be affirmed.

Respectfully submitted,

ROBERT T. STEPHAN *
Attorney General of Kansas
JOHN W. CAMPBELL
Deputy Attorney General
Kansas Judicial Center
Topeka, Kansas 66612
(913) 296-2215

TIMOTHY G. MADDEN
Special Asst. Atty. Gen.
Kansas Department of Corrections
4th Floor
900 Jackson Street
Topeka, Kansas 66612
(913) 296-4508
Counsels for Respondents

*Counsel of Record

APPENDIX A

Calendar No. 1579

76TH CONGRESS) SENATE (REPORT
3D SESSION) (No. 1523

RELINQUISHING CONCURRENT CRIMINAL JURISDICTION TO STATE OF KANSAS IN INDIAN CASES

APRIL 25 (legislative day, APRIL 24), 1940. – Ordered to be printed

MR. THOMAS of Oklahoma, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 372]

The Committee on Indian Affairs, to whom was referred the bill (S.372) to relinquish concurrent jurisdiction to the State of Kansas to prosecute Indians or others for offenses committed on Indian reservations, having considered the same, report thereon with the recommendation that it do pass with the following amendments:

Strike out all after the enacting clause and substitute the following:

> That jurisdiction is hereby conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts

have jurisdiction over offenses committed elsewhere within the state in accordance with the laws of the state: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

Amend the title so as to read:

A bill to confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations.

After receipt of this bill by your committee, it was referred to the Secretary of the Interior for further consideration and report, and thereafter, on March 16, 1940, he submitted his report, together with a suggestion that the bill be amended as herein recommended.

A full explanation of the purpose of this proposed legislation is contained in the said report of the Secretary of the Interior dated March 16, 1940, a copy of which is attached hereto and made a part of this report as follows:

DEPARTMENT OF THE INTERIOR,
Washington, March 16, 1940.

Hon. ELMER THOMAS,

Chairman, Committee on Indian Affairs, United States Senate.

MY DEAR SENATOR THOMAS: Further reference is made to your request for a report on the bill, S. 372, entitled "A bill to relinquish concurrent jurisdiction to the State of Kansas to prosecute Indians or others for offenses committed on Indian reservations."

For the reasons outlined in this letter and the enclosed memorandum, I recommend favorable consideration of S.372, amended, for clarification, as proposed in this report.

The Federal criminal statutes applicable to Indian reservations are limited in their scope, particularly with respect to injuries inflicted by one Indian upon the person or property of another Indian, and leave some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts. As the authority of the several States over wrongful or illicit acts committed upon tribal or restricted Indian lands extends in the main only to situations where both the offender and the victim are white men, the maintenance of law and order within Indian reservations is largely dependent upon tribal law and tribal courts. In the case of the four Kansas reservations, however, no tribal courts have existed for many years, and the Indians do not desire their reestablishment at this late date. With the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, including those covered by Federal statutes. The legality of this practice being questioned recently, the tribal councils of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance by a transfer of jurisdiction to the State.

Moreover, due to the breaking up of the Kansas reservations through the issuance of unrestricted patents for most of the allotted lands, considerably more than two-thirds of the area within the reservation boundaries has passed beyond Federal jurisdiction in criminal matters, which under existing laws extends for the most part

only to tribal and restricted lands, and has become subject to the general penal laws of Kansas and to its police authorities and criminal courts. The holdings that remain within the sphere of Federal jurisdiction are scattered in checkerboard fashion among the unrestricted holdings, thus subjecting the maintenance of law and order to many practical difficulties that can be most effectively met by conferring criminal jurisdiction over the entire area on the State. These considerations of administrative convenience extend to those offenses which are now cognizable in the Federal courts under the reservation statutes as well as to those which are not.

The situation S. 372 is designed to remedy presents some quite complex factors and a memorandum developing in more detail the justifying circumstances is enclosed.

Since the tribes concerned desire the authorization and continuance of the criminal jurisdiction hitherto exercised by the State courts, and since the checkerboard pattern of the land technically subject to Federal jurisdiction makes other arrangements difficult of administration, the conferring of jurisdiction in criminal matters on the State of Kansas, as proposed in S. 372, appears desirable. It is obvious that unless the State is permitted to exercise criminal jurisdiction over all lands within the reservation boundaries, various wrongful and illicit acts will probably escape punishment altogether, in view of the limited scope of the Federal penal statutes applicable to Indian reservations, and in view of the impracticability of reestablishing the tribal courts without the full concurrence of the Indians. Enactment of the bill will not prevent the prosecution in the Federal courts of those acts

which are within the cognizance of these courts under existing law. While I do not wish to be understood as approving in general the relinquishment of criminal jurisdiction over tribal Indians to the States where their reservations are located, I believe the peculiar factors which exist in the case of the Kansas tribes justify the enactment of S. 372.

However, the bill, as now worded, does not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to "relinquish concurrent jurisdiction" to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law.

In order that the bill may more accurately reflect the legal situation I propose that the title of the bill be changed to read: "To confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations," and that all after the enacting clause of the bill by stricken out and the following substituted:

"That jurisdiction is hereby conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as

its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

The Director of the Bureau of the Budget has advised me that there is not objection to the presentation of this report to your committee.

Sincerely yours,

E.K. BURLEW,
Acting Secretary of the Interior.

Enclosure.

MEMORANDUM ON S. 372

The Federal criminal statutes applicable to Indian reservations do not provide a complete code for the maintenance of law and order within these reservations. Insofar as offenses committed by Indians against Indians are concerned, virtually the only acts penalized by Federal law are the 10 major crimes listed in section 328 of the Criminal Code, as amended (18 U.S.C. 548), and the jurisdiction over all other offenses where both the offender and the victim are Indians is relegated to the tribes by section 2146 of the Revised Statutes, as amended (25 U.S.C. 218). Insofar as offenses committed by Indians against white men or by white men against Indians are concerned, "the general laws of the United States as to the punishment of crimes committed in any place within

the sole and exclusive jurisdiction of the United States, except the District of Columbia," are extended to Indian reservations by section 2145 of the Revised Statutes (25 U.S.C. 217). However, the Federal penal statutes applicable to places within the sole and exclusive jurisdiction of the United States, as set out in sections 272-288 and 311-322 of the Criminal Code (18 U.S.C. 451-467, 511-522), cover only a limited number of offenses. And while for the purpose of filling in the gaps in this list, section 289 of the Criminal Code, as amended (18 U.S.C., Supp. IV, 468), extends certain State criminal laws to places under the exclusive jurisdiction of the United States, the application of this provision to Indian reservations over which the United States has not acquired exclusive political jurisdiction from the State is extremely uncertain.

Offenses by Indians against non-Indians which fall within the 10 major crimes enumerated in section 328 of the Criminal Code, as amended, are expressly brought within the jurisdiction of the Federal courts by that section, but offenses by non-Indians against Indians are not subject to section 328, irrespective of their character. Insofar as offenses committed by white men against white men are concerned, the Supreme Court has held that the Federal statutes are inapplicable and that the trial and punishment of such offenses is a matter for the State, except where the reservation is located on lands over which the United States has acquired exclusive political jurisdiction by cession or otherwise (*United States v. McBratney,* 104 U.S. 621; *Draper v. United States,* 164 U.S. 240). In addition, a few other Federal criminal statutes, prohibiting for the most part the introduction or sale of

intoxicating liquors, apply specifically to Indian reservations, and, of course, the general penal statutes which under the Constitution operate in all parts of the United States, such as those pertaining to counterfeiting, extend to these reservations.

On the four Indian reservations in Kansas, however, there are no tribal courts and there have been none for many years. In the absence of such courts, offenses committed on these reservations and involving Indians have been prosecuted in the State courts, even where the criminal act charged constituted one of the major offenses listed in section 328 of the Criminal Code. For a considerable period the State courts accepted jurisdiction in the cases thus brought before them. These State law prosecutions were had with the approval of the tribes concerned, and the exercise of criminal jurisdiction by the State courts was to their general satisfaction. Recently, however, the authority of the State courts to proceed in these cases has been questioned, and it now appears that they are actually without authority to entertain such proceedings, as no jurisdiction over criminal offenses involving Indians has been relinquished to Kansas. Since tribal courts do not exist on the Kansas reservations, and since the jurisdiction of the Federal courts extends only to limited categories of offenses, many acts universally deemed wrongful, as, for example, the embezzlement by one Indian of money belonging to another Indian may escape punishment if the present situation is not remedied.

Moreover, the breaking up of the Indian reservations in Kansas through the issuance of unrestricted patents for most of the allotted lands has made the maintenance of

law and order by Federal authority administratively difficult. The superintendent in charge of these reservations reports that out of a total of about 115,900 acres of reservation land allotted to Indians of the four Kansas tribes only 34,937 acres remain in trust. The trust holdings are intermingled in checkerboard fashion with the approximately 80,963 acres of unrestricted holdings within the reservation boundaries. As Federal jurisdiction in criminal matters is at present almost wholly confined to tribal and restricted lands, and as the general criminal jurisdiction of the several States extends to unrestricted Indian allotments, it follows that considerably more than two-thirds of the area of these four reservations is already subject to the criminal laws, police, and courts of Kansas. Under existing law if an offense is committed within the reservation boundaries, an inquiry must first be made to determine whether the place of its commission is trust land or unrestricted land, in order to ascertain whether the State or the Federal authorities have jurisdiction. If the offense is found to have been committed on trust land, an inquiry must then be made into the race of the victim and the offender as well as into the other facts of the case, in order to determine whether it falls within one of the Federal statutes applicable to Indian reservations. However, if the offense is by a person other than an Indian and is against a person other than an Indian, the State authorities have jurisdiction irrespective of whether the land is trust or unrestricted. The administrative difficulties incident to the maintenance of law and order within an area where the applicable rules of law, and the agencies charged with their enforcement, vary from holding to holding are manifest.

Reestablishment of the tribal courts would largely meet the difficulties resulting from the absence of a comprehensive Federal code of Indian offenses, but it would not meet all the difficulties involved, since tribal courts have jurisdiction only over Indians and may not punish white men for offenses committed upon Indians. Nor would expansion of the list of Federal offenses so as to cover all wrongful or illicit acts customarily penalized by State criminal codes completely answer the problems, since the unrestricted lands within the reservations would still continue under State control in criminal matters and the administrative difficulties resulting from checkerboard allotments would not be alleviated.

The four tribes located on the Kansas reservations do not desire reestablishment of the tribal courts, but have expressed a wish that the jurisdiction hitherto exercised by the State courts be continued. The tribal councils of all four tribes have gone on record in favor of a transfer of jurisdiction in criminal matters to the State, and the superintendent in charge of the Kansas reservations also recommends that this action be taken. The superintendent reports that for a number of years the local authorities of the State have willingly and effectively cooperated with the Indian Service to maintain the peace, and enforce law and order, on trust lands as well as on unrestricted lands within the reservation boundaries. The superintendent also states that in the State courts "an Indian may not only expect a square deal but, if anything, there is a tendency to be more lenient with him than with a white offender." As the Indian Service is not now in a position to establish a law-and-order set-up on these four reservations, the superintendent is of the opinion that the

maintenance of law and order will get into a precarious condition if the State authorities are not permitted to continue giving the Indians police protection. Tribal courts could not function effectively without the wholehearted concurrence of the tribes concerned, and as has been already indicated, the members of these tribes prefer to be subject to State law in this particular. In short, the enactment of S. 372 will merely confirm a relationship which the State has willingly assumed, which the Indians have willingly accepted, and which has produced successful results, over a considerable period of years.

The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes; the Indians desire that ~~they~~ continue to do so; and a division of jurisdiction with respect to particular crimes based upon the place of their commission is rendered undesirable by the mutual interspersion of restricted and unrestricted holdings. The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable.

Accordingly, the enactment of S. 372, amended as proposed in the report of this department, appears to offer the best solution for the present undesirable situation.

APPENDIX B

76TH CONGRESS) HOUSE OF (REPORT
3D SESSION) REPRESENTATIVES (No. 1523

CONFERRING JURISDICTION ON THE STATE OF KANSAS OVER OFFENSES COMMITTED BY OR AGAINST INDIANS ON INDIAN RESERVATIONS

APRIL 22, 1940. – Referred to the House Calendar and ordered to be printed

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Mr. BURDICK, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany H. R. 3048]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 3048) to relinquish concurrent jurisdiction to the State of Kansas to prosecute Indians or others for offenses committed on Indian reservations, having considered the same, report favorably thereon, with amendments, and recommend that the bill, as amended, do pass.

The amendments are as follows:

Strike all after the enacting clause and substitute the following:

That jurisdiction is hereby conferred on the State of Kansas over offenses committed by or against Indians on

Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

Amend the title to read:

A bill to confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D. C., April 17, 1940.

STATEMENT ON H. R. 3048 TO THE COMMITTEE ON INDIAN AFFAIRS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I want to urge that you recommend out of the committee H. R. 3048 with the suggested change in language in one place. All parties are agreed on this bill – the Indians, the superintendent, the Indian agencies on the Kansas reservations, which are all in my district, and the people that are on and surround the reservations.

This bill has been O. K.'d by the Indian Office through the Interior Department and I understand by the Department of Justice and no objection found to it by the Budget. The Government here relinquishes to the State

full jurisdiction over the Indians for small offenses. It will be in the interest of law and order and a unified law enforcement.

I sincerely hope that the committee recommends the bill for passage.

W. P. LAMBERTSON.

A communication from the Secretary of the Interior, submitting his report on this proposed legislation, follows:

THE SECRETARY OF THE INTERIOR,
Washington, March 16, 1940.

HON. WILL ROGERS,
Chairman, Committee on Indian Affairs, House of Representatives.

MY DEAR MR. ROGERS: Further reference is made to your request for a report on the bill (H. R. 3048), entitled "A bill to relinquish concurrent jurisdiction to the State of Kansas to prosecute Indians or others for offenses committed on Indian Reservations."

For the reasons outlined in this letter and the enclosed memorandum, I recommend favorable consideration of H. R. 3048, amended, for clarification, as proposed in this report.

The Federal criminal statutes applicable to Indian reservations are limited in their scope, particularly with respect to injuries inflicted by one Indian upon the person or property of another Indian, and leave some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts. As the authority of the several States over wrongful or illicit acts committed

upon tribal or restricted Indian lands extends in the main only to situations where both the offender and the victim are white men, the maintenance of law and order within Indian reservations is largely dependent upon tribal law and tribal courts. In the case of the four Kansas reservations, however, no tribal courts have existed for many years, and the Indians do not desire their reestablishment at this late date. With the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, including those covered by Federal statutes. The legality of this practice being questioned recently, the tribal councils of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance by a transfer of jurisdiction to the State.

Moreover, due to the breaking up of the Kansas reservations through the issuance of unrestricted patents for most of the allotted lands, considerably more than two-thirds of the area within the reservation boundaries has passed beyond Federal jurisdiction in criminal matters, which under existing laws extends for the most part only to tribal and restricted lands, and has become subject to the general penal laws of Kansas and to its police authorities and criminal courts. The holdings that remain within the sphere of Federal jurisdiction are scattered in checkerboard fashion among the unrestricted holdings, thus subjecting the maintenance of law and order to many practical difficulties that can be most effectively met by conferring criminal jurisdiction over the entire area on the State. These considerations of administrative

convenience extend to those offenses which are now cognizable in the Federal courts under the reservation statutes as well as to those which are not.

The situation H. R. 3048 is designed to remedy presents some quite complex factors, and a memorandum developing in more detail the justifying circumstances is enclosed.

Since the tribes concerned desire the authorization and continuance of the criminal jurisdiction hitherto exercised by the State courts, and since the checkerboard pattern of the land technically subject to Federal jurisdiction makes other arrangements difficult of administration, the conferring of jurisdiction in criminal matters on the State of Kansas, as proposed in H. R. 3048, appears desirable. It is obvious that unless the State is permitted to exercise criminal jurisdiction over all lands within the reservation boundaries, various wrongful and illicit acts will probably escape punishment altogether, in view of the limited scope of the Federal penal statutes applicable to Indian reservations, and in view of the impracticability of reestablishing the tribal courts without the full concurrence of the Indians. Enactment of the bill will not prevent the prosecution in the Federal courts of those acts which are within the cognizance of these courts under existing law. While I do not wish to be understood as approving in general the relinquishment of criminal jurisdiction over tribal Indians to the States where their reservations are located, I believe the peculiar factors which exist in the case of the Kansas tribes justify the enactment of H. R. 3048.

However, the bill, as now worded, does not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to relinquish concurrent jurisdiction to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law.

In order that the bill may more accurately reflect the legal situation I propose that the title of the bill be changed to read: "To confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations," and that all after the enacting clause of the bill be stricken out and the following substituted:

"That jurisdiction is hereby conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

The Director of the Bureau of the Budget has advised me that there is no objection to the presentation of this report to your committee.

Sincerely yours,

(Signed) E. K. BURLEW,
Acting Secretary of the Interior.

MEMORANDUM ON H. R. 3048

The Federal criminal statutes applicable to Indian reservations do not provide a complete code for the maintenance of law and order within these reservations. Insofar as offenses committed by Indians against Indians are concerned, virtually the only acts penalized by Federal law are the ten major crimes listed in section 328 of the Criminal Code, as amended (18 U. S. C. 548), and the jurisdiction over all other offenses where both the offender and the victim are Indians is relegated to the tribes by section 2146 of the Revised Statutes, as amended (25 U. S. C. 218). Insofar as offenses committed by Indians against white men or by white men against Indians are concerned, "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia," are extended to Indian reservations by section 2145 of the Revised Statutes (25 U. S. C. 217). However, the Federal penal statutes applicable to places within the sole and exclusive jurisdiction of the United States, as set out in sections 272-288 and 311-322 of the Criminal Code (18 U. S. C. 451-467, 511-522), cover only a limited number of offenses. And while for the purpose of filling in the gaps in this list section 289 of the

Criminal Code, as amended (18 U. S. C., Supp. IV, 468), extends certain State criminal laws to places under the exclusive jurisdiction of the United States, the application of this provision to Indian reservations over which the United States has not acquired exclusive political jurisdiction from the State is extremely uncertain. Offenses by Indians against non-Indians which fall within the 10 major crimes enumerated in section 328 of the Criminal Code, as amended, are expressly brought within the jurisdiction of the Federal courts by that section, but offenses by non-Indians against Indians are not subject to section 328, irrespective of their character. Insofar as offenses committed by white men against white men are concerned, the Supreme Court has held that the Federal statutes are inapplicable and that the trial and punishment of such offenses is a matter for the State, except where the reservation is located on lands over which the United States has acquired exclusive political jurisdiction by cession or otherwise. *United States v. McBratney* (104 U. S. 621); *Draper v. United States* (164 U. S. 240). In addition, a few other Federal criminal statutes, prohibiting for the most part the introduction or sale of intoxicating liquors, apply specifically to Indian reservations, and, or course, the general penal statutes which under the Constitution operate in all parts of the United States, such as those pertaining to counterfeiting, extend to these reservations.

On the four Indian reservations in Kansas, however, there are no tribal courts and there have been none for many years. In the absence of such courts, offenses committed on these reservations and involving Indians have been prosecuted in the State courts, even where the criminal act charged constituted one of the major offenses

listed in section 328 of the Criminal Code. For a considerable period the State courts accepted jurisdiction in the cases thus brought before them. These State law prosecutions were had with the approval of the tribes concerned, and the exercise of criminal jurisdiction by the State courts was to their general satisfaction. Recently, however, the authority of the State courts to proceed in these cases has been questioned, and it now appears that they are actually without authority to entertain such proceedings, as no jurisdiction over criminal offenses involving Indians has been relinquished to Kansas. Since tribal courts do not exist on the Kansas reservations, and since the jurisdiction of the Federal courts extends only to limited categories of offenses, many acts universally deemed wrongful, as, for example, the embezzlement by one Indian of money belonging to another Indian, may escape punishment if the present situation is not remedied.

Moreover, the breaking up of the Indian reservations in Kansas through the issuance of unrestricted patents for most of the allotted lands has made the maintenance of law and order by Federal authority administratively difficult. The superintendent in charge of those reservations reports that out of a total of about 115,900 acres of reservation land allotted to Indians of the four Kansas tribes only 34,937 acres remain in trust. The trust holdings are intermingled in checkerboard fashion with the approximately 80,963 acres of unrestricted holdings within the reservation boundaries. As Federal jurisdiction in criminal matters is at present almost wholly confined to tribal and restricted lands, and as the general criminal jurisdiction of the several States extends to unrestricted Indian

allotments, it follows that considerably more than two-thirds of the area of these four reservations is already subject to the criminal laws, police and courts of Kansas. Under existing law if an offense is committed within the reservation boundaries, as inquiry must first be made to determine whether the place of its commission is trust land or unrestricted land, in order to ascertain whether the State or the Federal authorities have jurisdiction. If the offense is found to have been committed on trust land, an inquiry must then b made into the race of the victim and the offender as well as into the other facts of the case, in order to determine whether it falls within one of the Federal statutes applicable to Indian reservations. However, if the offense is by a person other than an Indian and is against a person other than an Indian, the State authorities have jurisdiction irrespective of whether the land is trust or unrestricted. The administrative difficulties incident to the maintenance of law and order within an area where the applicable rules of law, and the agencies charged with their enforcement, vary from holding to holding are manifest.

Reestablishment of the tribal courts would largely meet the difficulties resulting from the absence of a comprehensive Federal code of Indian offenses, but it would not meet all the difficulties involved, since tribal courts have jurisdiction only over Indians and may not punish white men for offenses committed upon Indians. Nor would expansion of the list of Federal offenses so as to cover all wrongful or illicit acts customarily penalized by State criminal codes completely answer the problem, since the unrestricted lands within the reservations

would still continue under State control in criminal matters and the administrative difficulties resulting from checkerboard allotments would not be alleviated.

The four tribes located on the Kansas reservations do not desire reestablishment of the tribal courts, but have expressed a wish that the jurisdiction hitherto exercised by the State courts be continued. The tribal councils of all four tribes have gone on record in favor of a transfer of jurisdiction in criminal matters to the State, and the superintendent in charge of the Kansas reservations also recommends that this action be taken. The superintendent reports that for a number of years the local authorities of the State have willingly and effectively cooperated with the Indian Service to maintain the peace, and enforce law and order, on trust lands as well as on unrestricted lands within the reservation boundaries. The superintendent also states that in the State courts an Indian may not only expect a square deal, but if anything, there is a tendency to be more lenient with him than with a white offender. As the Indian Service is not now in a position to establish a law and order set-up on these four reservations, the superintendent is of the opinion that the maintenance of law and order will get into a precarious condition if the State authorities are not permitted to continue giving the Indians police protection. Tribal courts could not function effectively without the wholehearted concurrence of the tribes concerned, and, as has been already indicated, the members of these tribes prefer to be subject to State law in this particular. In short, the enactment of H. R. 3048 will merely confirm a relationship which the State has willingly assumed, which

the Indians have willingly accepted, and which has produced successful results, over a considerable period of years.

The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes; the Indians desire that they continue to do so; and a division of jurisdiction with respect to particular crimes based upon the place of their commission is rendered undesirable by the mutual interspersion of restricted and unrestricted holdings. The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable.

Accordingly, the enactment of H. R. 3048, amended as proposed in the report of this Department, appears to offer the best solution for the present undesirable situation.

No. 91-5397

In the Supreme Court of the United States

OCTOBER TERM, 1992

EMERY L. NEGONSOTT, PETITIONER

v.

HAROLD SAMUELS, WARDEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

KENNETH W. STARR
Solicitor General

VICKI A. O'MEARA
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

EDWARD J. SHAWAKER
KATHERINE L. ADAMS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether 18 U.S.C. 3243 confers criminal jurisdiction on the State of Kansas to prosecute petitioner for an offense, committed on an Indian reservation, that would otherwise be within exclusive federal jurisdiction under the Major Crimes Act, 18 U.S.C. 1153.

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INTEREST OF THE UNITED STATES

The question presented by this case is whether the grant of criminal jurisdiction to the State of Kansas in 18 U.S.C. 3243 implicitly exempts those crimes that would otherwise be within exclusive federal jurisdiction under the Indian Major Crimes Act, 18 U.S.C. 1153. The Court's resolution of that question will have a substantial impact on federal law enforcement responsibilities in Kansas, as well as in Iowa and North Dakota, for which Congress enacted similarly worded statutes. The United States therefore has a strong programmatic interest in the outcome of this case. Furthermore, the United States has an

interest in this case because of its special relationship with the Indian Tribes, and its long experience and expertise in Indian law matters.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 3243 (the Kansas Act) states:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The Indian Major Crimes Act, 18 U.S.C. 1153, states in relevant part:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

STATEMENT

1. Petitioner Emery Negonsott is an enrolled member of the Kickapoo Tribe in Kansas, a federally recognized Indian Tribe. In 1985, he was arrested by the Brown County Sheriff, a state law enforcement official, in connection with the shooting of another Indian on the Kickapoo Reservation. Petitioner was subsequently convicted in Kansas state court of aggravated battery. The Supreme Court of Kansas affirmed, holding that the State had criminal jurisdiction over the offense. *State* v. *Nioce*, 716 P.2d 585 (Kan. 1986) (Pet. App. 21-34).[1]

2. Petitioner then filed the present habeas corpus action in the United States District Court for the District of Kansas. He claimed that 18 U.S.C. 3243, which grants the State of Kansas criminal jurisdiction over crimes by or against Indians committed on Indian reservations in Kansas, does not extend to aggravated battery. In petitioner's view, that crime, by virtue of being encompassed by the Indian Major Crimes Act, 18 U.S.C. 1153, remains subject to exclusive federal jurisdiction.

The district court rejected petitioner's claim. In the court's view, 18 U.S.C. 3243 grants Kansas jurisdiction over all crimes, even those covered by the Indian Major Crimes Act, over which the United States retains concurrent jurisdiction. Pet App. 35-

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[1] In so holding, the Supreme Court of Kansas overruled its prior decision in *State* v. *Mitchell*, 642 P.2d 981 (1982).

43. The Court of Appeals for the Tenth Circuit affirmed on the same ground. *Negonsott* v. *Samuels*, 933 F.2d 818 (1991) (Pet. App. 44-64).

SUMMARY OF ARGUMENT

The statute at issue, 18 U.S.C. 3243, was the first of several Acts of Congress that granted individual States jurisdiction to prosecute crimes committed by or against Indians on Indian reservations within their respective borders. The scope of Section 3243 is conspicuously broad. The first sentence of the statute, by its plain language, confers plenary jurisdiction on the State over crimes committed by or against Indians on reservations within the State "to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State." 18 U.S.C. 3243. That language is unqualified; by its terms, it permits the State to assume jurisdiction to prosecute petitioner for his crime of aggravated battery.

Petitioner contends, however, that the second sentence of the statute implicitly limits the scope of the unqualified grant of jurisdiction conferred by its first sentence. The second sentence provides that nothing in the statute shall "deprive" the federal courts of jurisdiction "over offenses defined by the laws of the United States." 18 U.S.C. 3243. Petitioner argues that because the Indian Major Crimes Act, 18 U.S.C. 1153, covers the conduct for which he was charged under state law, and because federal jurisdiction under the Indian Major Crimes Act ordinarily is exclusive, the preservation of federal jurisdiction in the second sentence of Section 3243 must be read to retain the "exclusive" aspect of that jurisdiction under the Indian Major Crimes Act. In other

words, petitioner argues that the federal courts are "deprived" of jurisdiction under Section 3243 if federal jurisdiction that was previously exclusive is made concurrent.

Petitioner's reading of Section 3243 is incorrect. The text of Section 3243 as a whole demonstrates that Congress granted Kansas *complete* criminal jurisdiction on Indian reservations, over both major and minor crimes. Although this interpretation eliminates the otherwise exclusive nature of federal jurisdiction under 18 U.S.C. 1153 over major crimes committed by Indians in Kansas, that was precisely the purpose of the first sentence of Section 3243. This interpretation in no sense "deprives" the federal courts of their subject matter jurisdiction over offenses defined by the laws of the United States. The federal courts retain jurisdiction to entertain any prosecution under the Indian Major Crimes Act.

Only this reading of Section 3243 gives full effect to the statute's language. Moreover, contrary to petitioner's contention (Pet. Br. 14), our reading does not work an "implied repeal" of the Indian Major Crimes Act. The exclusive nature of federal jurisdiction under the Major Crimes Act stems not from that Act, but from background principles of Indian law under which States have no jurisdiction over Indian country except as affirmatively granted by Congress. In Section 3243, however, Congress specifically granted Kansas plenary jurisdiction to prosecute state-law crimes committed by or against Indians on reservations within that State. Furthermore, federal jurisdiction over crimes defined by federal law remains exclusive of state jurisdiction; Kansas may not prosecute any Indian for a federal crime, but rather may only prosecute Indians for crimes as defined by state law.

Although resort to legislative history is unnecessary in light of the statute's clarity, Section 3243's legislative history strongly indicates that Congress understood that Kansas would enjoy complete criminal jurisdiction. That history demonstrates three primary points. First, prior to enactment of Section 3243, Kansas as a practical matter exercised jurisdiction over *all* crimes—major and minor—committed by or against Indians, regardless of whether the conduct involved was otherwise subject to federal jurisdiction. Second, the Indians in Kansas did not object to that regime of *de facto* state jurisdiction, and they in fact sought enactment of Section 3243 to ratify the legality of the State's exercise of jurisdiction. Third, Section 3243 was intended to confer on Kansas complete jurisdiction over all crimes, as defined by state law, committed on Indian reservations by or against Indians, while retaining jurisdiction in federal courts over crimes defined by federal law. There is no persuasive evidence that anyone involved in the legislative process believed that Section 3243's grant of plenary jurisdiction to the State implicitly excluded offenses that were theretofore within exclusive federal jurisdiction; instead, Congress intended that federal and state jurisdiction would be *concurrent* in those circumstances.

Finally, there is no merit to petitioner's contention that exposing him to state prosecution for his crime conflicts with general principles of Indian law. The canon of construction that statutes are to be liberally construed in favor of the Indians does not point to a ruling in petitioner's favor. First, that canon cannot overcome the clear text and history of Section 3243. Second, the statute's history makes clear that Section 3243 was enacted in part in response to requests from

the Indian Tribes in Kansas, and that the Tribes supported complete conferral of jurisdiction on the State to ensure adequate law enforcement on their reservations. Accordingly, it is consistent with the canon of construction on which petitioner relies—as well as with the special responsibility of the United States for the Indian Tribes—to interpret 18 U.S.C. 3243 to confer complete jurisdiction on the State.

ARGUMENT

18 U.S.C. 3243 CONFERS COMPLETE CRIMINAL JURISDICTION ON THE STATE OF KANSAS TO PROSECUTE ALL CRIMES DEFINED BY STATE LAW THAT ARE COMMITTED BY OR AGAINST INDIANS ON RESERVATIONS WITHIN THAT STATE, EVEN THOUGH SUCH CRIMES MIGHT OTHERWISE HAVE BEEN WITHIN EXCLUSIVE FEDERAL JURISDICTION

A. Background

The generally applicable framework governing criminal jurisdiction on Indian reservations is well established. Under 18 U.S.C. 1152, crimes committed by or against Indians in Indian country are subject to federal jurisdiction. However, the second paragraph of Section 1152 expressly excludes offenses committed by one Indian against the person or property of another.[2] Such offenses between Indians are typically subject to the exclusive jurisdiction of the Tribe concerned, except for offenses covered by the

[2] Offenses committed by one non-Indian against another non-Indian are implicitly excluded from 18 U.S.C. 1152 under *United States* v. *McBratney*, 104 U.S. 621 (1882), and its progeny. Those offenses are instead subject to state jurisdiction.

Indian Major Crimes Act, 18 U.S.C. 1153. That Act makes it a federal offense for an Indian to commit any of the crimes it enumerates against the person or property of another Indian or other person within Indian country. See *Duro* v. *Reina*, 495 U.S. 676, 696-697 (1990).

This Court has held that federal jurisdiction over those offenses committed by Indians that are covered by 18 U.S.C. 1153 is exclusive of state jurisdiction. *United States* v. *John*, 437 U.S. 634, 651 (1978); see also *Seymour* v. *Superintendent*, 368 U.S. 351, 359 (1962).[3] The Court has also repeatedly stated (albeit in dictum) that federal jurisdiction over other crimes under 18 U.S.C. 1152 likewise is exclusive of state jurisdiction. *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *Williams* v. *Lee*, 358 U.S. 217, 220 n.5 (1959); *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-471 & n.9 (1979). A number of state courts have likewise so held. See *State* v. *Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989); *Arquette* v. *Schneckloth*, 351 P.2d 921 (Wash. 1960); *In re Application of Denetclaw*, 329 P.2d 697 (Ariz. 1958); *State* v. *Kuntz*, 66 N.W.2d 531 (N.D. 1954); see also *State* v. *Warner*, 379 P.2d 66, 68-69 (N.M. 1963) (dictum); *State* v. *Jackson*, 16 N.W.2d 752, 754 (Minn. 1944) (dictum); 30 Op. Or. Att'y Gen. 11 (1960).[4]

Congress may, of course, alter these jurisdictional arrangements, and it has done so in some circumstances. Public Law 280, which was enacted in 1953, is the most familiar example. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. 1162 and 25 U.S.C. 1321-1362). That statute automatically conferred on certain States jurisdiction over offenses involving Indians in Indian country. The statute also authorized other States to assume such jurisdiction in certain circumstances. See *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. at 471-474.

Prior to Public Law 280's enactment, Congress passed a series of special statutes granting particular States jurisdiction over some or all Indian country within their respective borders. In particular, three virtually identical statutes conferred jurisdiction on Kansas, Iowa, and North Dakota to prosecute crimes committed by or against Indians on Indian reservations in those States. See Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. 3243) (Kansas Act); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Iowa Act); Act of May 31, 1946, ch. 279, 60 Stat.

[3] In his petition for certiorari (Pet. 13-14), petitioner states that Indian Tribes have no jurisdiction over crimes enumerated in the Indian Major Crimes Act. This Court recently noted, however, that "[i]t remains an open question whether jurisdiction under § 1153 over crimes committed by Indian tribe members is exclusive of tribal jurisdiction." *Duro* v. *Reina*, 495 U.S. at 680 n.1 (citing *United States* v. *Wheeler*, 435 U.S. 313, 325 n.22 (1978)). And there is, of course, nothing in Section 1153 that expressly ousts the Tribe concerned of its jurisdiction to prosecute crimes based on the same conduct.

[4] In our amicus brief urging denial of the petition for certiorari in *Arizona* v. *Flint*, 492 U.S. 911 (1989) (denying cert.), we took the position that federal jurisdiction under 18 U.S.C. 1152 is exclusive. We relied, *inter alia*, on the decisions cited in the text; Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588) and its legislative history; and the background of special statutes (including 18 U.S.C. 3243, at issue in this case) that confer criminal jurisdiction on particular States.

229 (North Dakota Act).[5] This case concerns the oldest of those three statutes, 18 U.S.C. 3243, which was enacted in 1940 and conferred plenary criminal jurisdiction on the State of Kansas over the four Indian reservations within its borders.

B. The Plain Language Of Section 223 Unambiguously Confers On Kansas Complete Jurisdiction To Prosecute All Crimes Defined By State Law That Are Committed By Or Against Indians On Reservations Within That State

Section 3243 provides in full:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

[5] In language identical to that contained in 18 U.S.C. 3243, the Iowa Act conferred on the State jurisdiction over crimes committed by or against Indians on the Sac and Fox Indian Reservation in Iowa. See 62 Stat. 1161. The North Dakota Act likewise conferred jurisdiction with respect to crimes committed by or against Indians on the Devils Lake Sioux Reservation in that State. See 60 Stat. 229. The conferral of jurisdiction in the Iowa Act has been construed not to reach conduct that would come within federal jurisdiction under the Indian Major Crimes Act, 18 U.S.C. 1153. See *Youngbear* v. *Brewer*, 549 F.2d 74 (8th Cir. 1977), aff'g 415 F. Supp. 807 (N.D. Iowa 1976); *State* v. *Bear*, 452 N.W.2d 430 (Iowa 1990). As we argue below, that construction is incorrect. The question whether the North Dakota Act grants the State jurisdiction over conduct that also comes within federal jurisdiction under Section 1153 has not been determined by any court. See *State* v. *Hook*, 476 N.W. 2d 565, 571 n.6 (N.D. 1991) (reserving question).

The language of the first sentence of Section 3243 unambiguously confers criminal jurisdiction on Kansas over *all* offenses (as defined by state law) committed by or against Indians on Indian reservations, whether or not the conduct involved is also made a federal offense by 18 U.S.C. 1152 or 1153 (or by the laws of the tribe concerned). See Pet. App. 50-51.

Although petitioner does not focus on the language of Section 3243, he does not and cannot dispute that the first sentence of 18 U.S.C. 3243, standing alone, subjects him to state jurisdiction. He contends (Pet. Br. 5-11), however, that insofar as his offense is concerned, the jurisdiction conferred by the first sentence is destroyed by the second. The second sentence preserves the jurisdiction of federal courts "over offenses defined by the laws of the United States committed by or against Indians on Indian reservations." Petitioner argues that because the Indian Major Crimes Act includes the crime (aggravated battery) of which he was convicted [6]—and that because federal jurisdic-

[6] The Indian Major Crimes Act does not specifically mention battery, aggravated or otherwise. It does, however, include among the listed offenses "assault with intent to commit murder, assault with a dangerous weapon, [and] assault resulting in serious bodily injury." 18 U.S.C. 1153(a). The Kansas statute that petitioner was convicted of violating defines aggravated battery, in part, as "the unlawful touching or application of force" to another person, "which either:

tion under that Act ordinarily is exclusive—the preservation of federal jurisdiction in the second sentence of Section 3243 must be read to retain the "exclusive" aspect of that jurisdiction under the Indian Major Crimes Act. In petitioner's view, the first sentence of Section 3243 can be read according to its plain meaning only if Congress impliedly "repealed" the Indian Major Crimes Act. See Pet. Br. 14. Petitioner's argument misapprehends the import of both 18 U.S.C. 3243 and the Indian Major Crimes Act.

The text of Section 3243 as a whole demonstrates that Congress granted Kansas *complete* criminal jurisdiction, over both major and minor crimes. Although this interpretation eliminates the otherwise exclusive nature of federal jurisdiction under 18 U.S.C. 1153 over major crimes committed by Indians on reservations in Kansas, that was precisely the purpose of the first sentence of Section 3243. The second sentence, by its plain language, preserved the subject matter jurisdiction of federal courts over crimes defined by federal law. It does not suggest that this jurisdiction, as so preserved, is exclusive of the jurisdiction of the *state* courts over crimes defined by *state* law. In the words of 18 U.S.C. 3243, giving full effect to the first sentence's unqualified conferral of "jurisdiction" on the state courts over crimes defined by the "laws of the State" does not "deprive" the "courts of the United States" of their distinct "jurisdiction"

(a) [i]nflicts great bodily harm upon him; or * * * (c) [i]s done with a deadly weapon, or in any manner whereby great bodily harm * * * can be inflicted." Kan. Stat. Ann. § 21-3414 (1988). We shall assume—as did the parties and both the state and federal courts below—that the state crime of which petitioner was convicted is the equivalent of one of the assault offenses enumerated in 18 U.S.C. 1153.

over "offenses defined by the laws of the United States." The federal courts retain their jurisdiction to entertain any prosecution under the Indian Major Crimes Act.[7]

Petitioner's construction of the second sentence of Section 3243—which renders federal jurisdiction exclusive wherever conduct is made criminal by federal law—directly conflicts with the first sentence's unqualified grant of jurisdiction to Kansas. In contrast, construing the second sentence to preserve *concurrent* federal authority over the same general subject matter best comports with the canon of construction that full effect should be given to all of the statute's language, see *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979)—a familiar canon that this Court has applied to statutes affecting Indians. See *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

Nor does this interpretation work an "implied repeal" of the Indian Major Crimes Act. In the first place, there is nothing "implied" about the effect of Section 3243: state jurisdiction follows from the express terms of the first sentence of that Section, which cannot be given effect unless the exclusivity of federal jurisdiction under Section 1153 is modified. Moreover, it is not the language of the Indian Major

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[7] Moreover, the subject matter jurisdiction of the federal courts over federal prosecutions under the Indian Major Crimes Act or 18 U.S.C. 1152 remains *exclusive* under 18 U.S.C. 3231. As a result, Kansas cannot prosecute any Indian in state court for violations of federal law; it must rely on state law. The fact that the same conduct might also be criminal under the Indian Major Crimes Act has no bearing on the validity of such state prosecutions.

Crimes Act itself that precludes the exercise of state jurisdiction over conduct by Indians that constitutes a federal crime under that Act. The preclusion flows, instead, from the general principle that States have no inherent jurisdiction over Indians in Indian country, *United States* v. *John*, 437 U.S. at 651-653; *Fisher* v. *District Court*, 424 U.S. 382 (1976), and may exercise such jurisdiction only where (as here) there is a clear grant of authority by Congress. *Williams* v. *Lee*, 358 U.S. at 221 ("when Congress has wished the States to exercise [criminal and civil adjudicatory jurisdiction] it has expressly granted [it to] them"); *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976). By virtue of that settled principle, Kansas would have been without jurisdiction to prosecute an Indian for commission of a major crime committed on an Indian reservation within its borders (prior to enactment of 18 U.S.C. 3243) even if the Indian Major Crimes Act had never been enacted. *United States* v. *Kagama*, 118 U.S. 375, 384 (1886); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); cf. *Ex parte Crow Dog*, 109 U.S. 556 (1883); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-756 (1867). Conversely, by expressly granting the State jurisdiction over all offenses in Section 3243, Congress destroyed the underlying premise of the Indian Major Crimes Act's exclusivity (while at the same time preserving federal court jurisdiction over federal crimes.)

Finally, just as jurisdiction under the Indian Major Crimes Act ordinarily is exclusive of state jurisdiction, federal jurisdiction under 18 U.S.C. 1152 over other crimes committed by or against Indians in Indian country also is ordinarily exclusive of state jurisdiction. See pp. 8-9, *supra*. Accordingly,

under petitioner's view (that the second sentence of Section 3243 renders federal jurisdiction exclusive wherever it exists), the first sentence would actually confer jurisdiction on Kansas only over those offenses that are not also crimes defined by federal law.[8] In other words, Section 3243 would confer no concurrent jurisdiction at all. That view is contrary to the explicit text of the Act, as well as its legislative history, to which we now turn.

C. The Legislative History of Section 3243 Does Not Contradict Its Plain Language, And Instead Strongly Indicates That Congress Understood That State And Federal Jurisdiction Over Conduct Punishable Under Federal Law Would Be Concurrent

As we have argued, the language of Section 3243 plainly provides that Kansas has complete jurisdiction over crimes defined by state law that are com-

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[8] Under petitioner's view, the only offenses over which the State obtained jurisdiction under 18 U.S.C. 3243 would be those non-major crimes committed by one Indian against another (which, by virtue of the second sentence of 18 U.S.C. 1152, are ordinarily subject to the exclusive jurisdiction of the tribe concerned)—and, perhaps, those offenses defined by state law and assimilated into federal law by 18 U.S.C. 1152 and the Assimilative Crimes Act, 18 U.S.C. 13. The Tenth Circuit has held that assimilated state crimes are not "offenses defined by the laws of the United States" within the meaning of the proviso to 18 U.S.C. 3243. See *Iowa Tribe of Indians* v. *Kansas*, 787 F.2d 1434, 1439-1440 & n.3 (1986); cf. *United States* v. *Bear*, 932 F.2d 1279, 1281 (9th Cir. 1990). Under that view, state jurisdiction over such offenses is exclusive, and the second sentence of Section 3243 preserves concurrent federal jurisdiction under 18 U.S.C. 1152 only over offenses that are independently defined by federal law. See F. Cohen, *Cohen's Handbook of Federal Indian Law* 375 & n.244 (1982 ed.)

mitted by or against Indians within that State, while also preserving federal jurisdiction over crimes defined by federal law. Contrary to petitioner's and his amici's contention, the legislative history does not contradict the plain import of the statute's language. See Pet. Br. 15-22; Devils Lake Sioux Tribe *et al.* Amici Br. 4-5. Indeed, that history confirms Congress's intent to establish a regime of concurrent jurisdiction.

1. The legislative history of the statute demonstrates three primary points: (a) prior to enactment of Section 3243, Kansas as a practical matter exercised jurisdiction over *all* crimes committed by or against Indians, regardless of whether they were major or minor or whether they were otherwise subject to federal jurisdiction; (b) the Indians in Kansas did not object to this regime, but rather sought enactment of Section 3243 to ratify the legality of the State's exercise of jurisdiction; and (c) Section 3243 was intended to confer on Kansas complete jurisdiction over all crimes (as defined by state law) committed on Indian reservations by or against Indians, while retaining jurisdiction in federal courts over crimes defined by federal law. See H.R. Rep. No. 1999, 76th Cong., 3d Sess. (1940) (House Report); S. Rep. No. 1523, 76th Cong., 3d Sess. (1940) (Senate Report).

Both the House and Senate Reports consist almost exclusively of a letter and memorandum from Acting Secretary of the Interior Burlew commenting on the proposal to confer jurisdiction on Kansas and the original version of the bill intended to accomplish that result. The Acting Secretary offered an alternative version of the bill that took account of views he expressed in the letter and memorandum, and it was that version that Congress enacted into law as Section

3243. Thus, the views of the Acting Secretary, who headed the agency responsible for administering Indian affairs, are of considerable relevance in construing Section 3243, *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979), especially since the responsible congressional committees adopted his views and proposal in their reports.

The letter and memorandum explain that Kansas then exercised jurisdiction over all crimes by or against Indians. The Acting Secretary expressed the view that without the exercise of jurisdiction by the State, law enforcement on Indian reservations in Kansas would have been inadequate. The reason was that existing federal criminal statutes "le[ft] some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts,"[9] and

[9] The memorandum accompanying the Acting Secretary's letter stated that it was "extremely uncertain" whether the Assimilative Crimes Act (now codified at 18 U.S.C. 13), which incorporates state law as federal law for offenses in areas of sole and exclusive federal jurisdiction, was applicable to areas of Indian country over which the United States had not acquired exclusive political jurisdiction. House Report at 3; Senate Report at 3. If the Assimilative Crimes Act was inapplicable, only the relatively few offenses separately defined by federal law would have been applicable in Indian country under what is now 18 U.S.C. 1152. Under that view, Acting Secretary Burlew was correct in stating (in the passage quoted in text) that "practically all minor offenses" by or against Indians on Indian reservations were "outside the jurisdiction of the Federal courts." Of course, as the Tenth Circuit pointed out in *Iowa Tribe of Indians* v. *Kansas*, 787 F.2d at 1439 n.3, this Court subsequently made clear in *Williams* v. *United States*, 327 U.S. at 713-714, that the Assimilative Crimes Act does apply to Indian country through what is now 18 U.S.C. 1152.

that "[i]n the case of the four Kansas reservations * * * no tribal courts [had] existed for many years." House Report at 2; Senate Report at 2. As a practical matter, therefore, "offenses committed on these reservations and involving Indians have been prosecuted in the State courts, *even where the criminal act charged constituted one of the major offenses listed in [the Major Crimes Act]*." House Report at 4 (emphasis added); Senate Report at 3 (emphasis added). The Acting Secretary reported that "[t]hese State law prosecutions were had with the approval of the tribes concerned, and the exercise of criminal jurisdiction by the State courts was to their general satisfaction." *Ibid.*

The bill was proposed because questions had then recently been raised about "the authority of the State courts to proceed in these cases," House Report at 4; Senate Report at 3, and the legislative history makes clear that the bill was enacted to ratify the then-existing regime of *de facto* state jurisdiction. Indeed, according to the Acting Secretary, the Indians themselves "[did] not desire reestablishment of the tribal courts, but * * * expressed a wish that the jurisdiction hitherto exercised by the State courts be continued." House Report at 4; Senate Report at 4. Inasmuch as the State had exercised jurisdiction over *all* offenses, including those defined as major crimes under federal law, both the Executive and the Legislative Branches plainly understood that the bill would confer jurisdiction over *all* offenses defined by Kansas law, whether or not those offenses were subject to federal jurisdiction as well. The Acting Secretary of the Interior made this point explicitly: "In short, the enactment of [Section 3243] will merely confirm a relationship which the State has willingly assumed,

which the Indians have willingly accepted, and which has produced successful results, over a considerable period of years." House Report at 5; Senate Report at 4."[10]

2. Petitioner contends (Pet. Br. 9-11) that an amendment to the bill that became 18 U.S.C. 3243 demonstrates that Congress intended federal jurisdiction over offenses covered by the Major Crimes Act to be exclusive. As originally proposed, the bill provided for "relinquish[ment]" of "concurrent jurisdiction" to Kansas, and specifically stated that the Indian Major Crimes Act, 18 U.S.C. 548 (1934)—as well as 25 U.S.C. 217 and 218 (1934), the predecessors of 18 U.S.C. 1152—would be "modified accordingly." See 86 Cong. Rec. 5596 (1940). Subsequently, both Houses adopted a substitute version that both re-

[10] Another feature of the legislative history supports this conclusion. The memorandum submitted by the Acting Secretary explained that only approximately one third of the lands on the Kansas reservations that had been allotted to individual Indians remained in trust status. The memorandum further explained that federal jurisdiction was then limited to reservation lands that remained in trust or restricted status. House Report at 4; Senate Report at 3; cf. *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 688 (1992). (Not until 1948 was Indian country defined to include all lands within an Indian reservation. See 18 U.S.C. 1151; *County of Yakima*, 112 S. Ct. at 689; *Solem* v. *Bartlett*, 465 U.S. 463, 468 (1984).) As a result, the State of Kansas in 1940 already exercised comp..te criminal jurisdiction over much of the Kansas reservations, albeit in a checkerboard pattern. One of the purposes of 18 U.S.C. 3243 was to minimize the difficulties arising from that regime by extending complete state jurisdiction throughout the reservations. House Report at 4-5; Senate Report at 4. Petitioner's interpretation of 18 U.S.C. 3243, however, would reintroduce a checkerboard pattern of state jurisdiction.

vised the language conferring jurisdiction on the State (by, *inter alia*, deleting the reference to "concurrent" jurisdiction) and omitted the explicit modification of the Indian Major Crimes Act and what is now 18 U.S.C. 1152. In light of those revisions, petitioner argues that Section 3243, as enacted, must be construed as *not* conferring concurrent jurisdiction and as *not* modifying the exclusive aspect of federal jurisdiction under the Indian Major Crimes Act." Cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987).

Rather than supporting petitioner's position, however, the amendment confirms our reading of Section 3243. Petitioner fails to point out that the substitute version was proposed by the Acting Secretary in order to express more accurately the legal situation as it then existed and as it was "intended to be created." House Report at 3; Senate Report at 2. In particular, because federal courts apparently had exercised jurisdiction only over major crimes, the Acting Secre-

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[=] Petitioner relies heavily (Pet. Br. 16-17) on the district court's decision in *Youngbear* v. *Brewer*, 415 F. Supp. 807, 812-813 (N.D. Iowa 1976), aff'd, 549 F.2d 74, 76 (8th Cir. 1977), which construed the Iowa Act and, based largely on the sequence of events described in the text, concluded that federal jurisdiction over major crimes remained exclusive. In reaching that conclusion, the *Youngbear* court dismissed Acting Secretary Burlew's letter and its accompanying memorandum—which unambiguously support our position—because those materials "refer[] to the original bill, which was drafted by the Interior Department and would have explicitly granted concurrent jurisdiction." 415 F. Supp. at 813 n.5. That rationale was plainly wrong. The Acting Secretary's comments on which we rely were made in the course of suggesting amendments to the bill, and the final statute included those amendments in their entirety.

tary thought that it was inaccurate to describe the bill as generally "relinquishing" "concurrent" jurisdiction to Kansas; rather, in his view, it would confer complete criminal jurisdiction on the State over both major and minor crimes, whether or not the federal government would also have jurisdiction over the particular offense. He explained:

> The bill proposes to "relinquish concurrent jurisdiction" to the State of Kansas, intending thereby *to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law.* However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, *but a case of conferring upon the State complete criminal jurisdiction*, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law.

House Report at 3 (emphasis added); accord, Senate Report at 2. Thus, the substitute bill the Acting Secretary proposed (and Congress enacted) was intended to make clear that Section 3243 would confer jurisdiction over *more* than those offenses that then happened to be subject to federal law—not, as petitioner asserts, to narrow the scope of the bill by withholding jurisdiction from the State over crimes stemming from conduct that also is unlawful under federal law.[=] See Pet. App. 60-61; *Iowa Tribe of Indians* v.

[=] See also House Report at 5 ("The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not."); accord, Senate Report at 4.

Kansas, 787 F.2d at 1439-1440. As the court of appeals correctly noted, the "decision to excise the word 'concurrent' * * * was to clarify rather than to change [the] substance" of what is now 18 U.S.C. 3243. Pet. App. 61.[11]

The Acting Secretary also explained that the second sentence of 18 U.S.C. 3243 was intended only to ensure that "prosecution in the Federal courts of those

[11] The Acting Secretary did not explain why his substitute lacked a provision stating that the Indian Major Crimes Act and what is now 18 U.S.C. 1152 were "modified accordingly." At least two explanations are possible. First, because the substitute version expressly provided that the State would have complete jurisdiction and that the United States would retain whatever jurisdiction it then had over offenses defined by federal law (namely, those under the Indian Major Crimes Act and what is now 18 U.S.C. 1152), there was no need to reiterate what the effect on the latter statutory provisions would be. See Pet. App. 61 ("Reference to modification of the Major Crimes Act was apparently dropped as unnecessary when the second sentence of the Kansas Act was added instead."). Second, the "exclusive" nature of federal jurisdiction over offenses covered by the Indian Major Crimes Act and what is now 18 U.S.C. 1152 derived not from those specific statutory provisions, but from more general principles of Indian law that rendered state law inapplicable to matters involving Indians in Indian country. See pp. 13-14, *supra*. The express conferral of criminal jurisdiction on Kansas in the first sentence of Section 3243 was accordingly sufficient to displace those general principles of preemption, and there was no need to "modify" the Indian Major Crimes Act or the predecessors of 18 U.S.C. 1152 in order to provide for state jurisdiction. In any event, any negative inference that might be drawn from the mere absence of an "express" modification of the Indian Major Crimes Act is wholly insufficient to overcome the clear import of the all-encompassing statutory text and legislative history.

offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable." House Report at 5; Senate Report at 4. It would have been extraordinary to refer to a mere lack of *preclusion* of federal jurisdiction if, as petitioner urges, federal jurisdiction over major crimes was to remain *exclusive*. More importantly, the obvious corollary to the Acting Secretary's statement was that the State would have jurisdiction in *all* cases, with federal jurisdiction serving as a backstop, to be exercised on a case-by-case basis where that course seemed "advisable"—*e.g.*, where the State declined to exercise jurisdiction.

3. Finally, petitioner relies (Pet. Br. 17) on a letter from Representative Lambertson of Kansas to the House Committee on Indian Affairs recommending enactment of the proposed bill. See House Report at 1-2.[12] In that letter, Representative Lambertson noted that "[t]he Government here relinquishes to the State full jurisdiction over the Indians for small offenses." *Id.* at 2. The negative implication, petitioner argues, is that Congress intended to confer no jurisdiction over crimes included in the Major Crimes Act.

That argument is entirely unpersuasive. If anything, the fact that Representative Lambertson understood Congress to be relinquishing to Kansas

[12] Petitioner states that the Tenth Circuit in *Iowa Tribe of Indians* v. *Kansas*, 787 F.2d at 1440, "held that this letter * * * was the most persuasive evidence of congressional intent." Pet. Br. 16 n.1. In fact, the Tenth Circuit did not so hold, but merely noted in passing (erroneously, in our view) that the letter was "perhaps" the most persuasive evidence of congressional intent.

"full" jurisdiction over "small offenses"—with the implication that there would be no federal jurisdiction over those offenses—suggests that he believed the State would acquire only partial (*i.e.*, concurrent) jurisdiction over major crimes. See Pet. App. 57-58.[15] It certainly does not suggest that the State would have no jurisdiction over major crimes, a position entirely irreconcilable with the plain language of the first sentence of the proposed statute; indeed, Representative Lambertson did not address the question of major crimes at all. Acceptance of petitioner's view (that Representative Lambertson's letter contained a negative implication that federal major crimes jurisdiction was to remain exclusive) would leave us, like the court of appeals, "at a loss to expla[i]n why [the letter] contravenes" the rest of the legislative history, "which clearly evince[s] an understanding that Kansas * * * could exercise criminal jurisdiction over all

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[15] In stating that Kansas acquired "full" jurisdiction over "small offenses," Representative Lambertson may have been referring to non-major crimes committed by one Indian against another. Because such crimes are excluded from federal jurisdiction under 18 U.S.C. 1152 by the second sentence of that provision—and because the Tribes concerned did not have tribal courts that could exercise jurisdiction over such crimes—Kansas acquired "full" jurisdiction over those crimes under Section 1162.

Another possibility is that Representative Lambertson shared the view (discussed in note 8, *supra*) that 18 U.S.C. 1152 did not apply to a large number of offenses between Indians and non-Indians because it did not incorporate state-law crimes as federal crimes through the Assimilative Crimes Act. Under that view (which has since been proven wrong), the State would have acquired "full" jurisdiction (exclusive of the United States) over such state-law crimes. See also note 8, *supra*.

state-law crimes occurring on Indian lands." Pet. App. 58.[16]

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[16] Amici Devils Lake Sioux Tribe, *et al.*, err in suggesting (Br. 5-21) that the background of the special jurisdictional statutes passed (and patterned) after the Kansas Act supports petitioner's interpretation of that Act. Petitioner cites nothing in the legislative history of those statutes that gives any indication that the conferral of jurisdiction on the States involved was less than complete. Indeed, to the extent the legislative history of those later-enacted statutes has any relevance here, see *Sullivan* v. *Finkelstein*, 496 U.S. 617, 631-632 (1990) (Scalia, J., concurring), it supports our interpretation of the Kansas Act.

The legislative history of the Iowa Act clearly establishes that Iowa was to have complete jurisdiction over the Sac and Fox Reservation. See H.R. Rep. No. 2356, 80th Cong., 2d Sess. 4 (1948) (letter from Undersecretary of the Interior) (emphasis added) ("While under this bill the State officers and the State courts will have jurisdiction over *all* offenses, the proviso reserves a right in the Federal court to exercise jurisdiction in the class of cases indicated."); *id.* at 3 (letter from Assistant Attorney General) (emphasis added) (Iowa Act is "substantially the same" as Kansas Act, under which "*concurrent* jurisdiction was conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations").

In addition, the legislative history of the North Dakota Act describes that Act in all-inclusive terms. For example, the Acting Secretary of the Interior stated that the bill's purpose was "to assure these Indians that they will continue to be subject to the same laws and courts as other citizens and residents of the State." S. Rep. No. 997, 79th Cong., 2d Sess. 2 (1946); accord, H.R. Rep. No. 2032, 79th Cong., 2d Sess. 2 (1946). The committee reports also contain a resolution adopted by the Indians of the Devils Lake Tribe recommending enactment of the bill, in which the Indians acknowledged that the state courts had for more than 40 years exercised jurisdiction over them, and expressed their belief that they should be treated the same as all other citizens of the

D. Construing Section 3243 As Granting Complete Jurisdiction To Kansas To Prosecute All Crimes Defined By State Law Does Not Conflict With General Principles Of Indian Law

Failing to make a convincing argument from the statutory text or legislative history, petitioner and his amici fall back to arguments based on general principles of Indian law. In particular, they place heavy reliance (Pet. Br. 11-14; Devils Lake Sioux Tribe *et al.* Br. 21-28) on the canon of construction that statutes are to be liberally construed in favor of the Indians. See, *e.g.*, *Bryan* v. *Itasca County*, 426 U.S. at 392; *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 79 (1918); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912).

That doctrine does not require a different construction in this case, however, for two reasons. First, the canon favoring liberal construction of statutes in favor of Indians simply cannot overcome the clear text and legislative history of Section 3243. See *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Second, Section 3243 was enacted in part on the understanding that the Kansas tribes had "expressed a wish that the jurisdiction hitherto exercised by the State courts be continued." House Report at 4-5. The committee reports explain that prior state prosecutions—including those for major crimes—"were had with the approval of the tribes concerned, and the exercise of criminal jurisdiction by the State courts was to their general satisfaction." *Id.* at 4; Senate Report at 3. The reports further explain that the Indians had expressed a desire for unified and effective law enforcement on the reservations within Kansas because they were unable to establish a tribal system of justice. See House Report at 4-5; Senate Report at 3-4. Congress responded by enacting Section 3243 as a means of advancing the Indians' interests. The doctrine that statutes should be construed to favor Indians is not a basis for reflexively granting an individual Indian like petitioner his preference as to which sovereign will prosecute him for a crime—especially in the face of the contrary view of "[t]he tribal councils of all four [Kansas] tribes," which, Congress was told, went "on record in favor of a transfer of jurisdiction in criminal matters to the State." House Report at 4; Senate Report at 4. Like the court of appeals, this Court should be "unwilling to conclude that state court criminal jurisdiction *conferred by Congress in response to tribal requests* invades the special relationship between the tribes and the federal government." Pet. App. 62. Compare *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 476 U.S. 877, 892-893 (1986) (noting importance of tribal consent in conferring jurisdiction on States with respect to matters affecting Indians).

Finally, petitioner finds it "inconceivable that Congress would pass a law subjecting a Kansas Indian to prosecution [in] both the state and federal courts." Pet. Br. 13. Of course, given the background of state prosecution of all crimes, major and minor, and the statute's purpose of ratifying that practice, that result plainly is not inconceivable. To the contrary,

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State. S. Rep. No. 997, *supra*, at 3; H.R. Rep. No. 2032, *supra*, at 3.

Finally, the House Report on the 1948 precursor to Public Law 280, which amici concede (Br. 10) was identical in substance to the Kansas, North Dakota, and Iowa Acts, describes the bill as vesting "concurrent" jurisdiction in the States. H.R. Rep. No. 1506, 80th Cong., 2d Sess. 2 (1948).

establishing a regime of complete state jurisdiction, with concurrent federal jurisdiction over crimes defined by federal law, was the explicit purpose of the statute. Moreover, as the court of appeals stated, the mere existence of overlapping state and federal jurisdiction to prosecute is not unjust, especially where "the overlap resulted from legislation requested of Congress by the Tribes." Pet. App. 63. Petitioner cites no instance in which a Kansas Indian has been prosecuted in both the state and federal courts, and the Justice Department's *Petite* policy would limit those instances in which a federal prosecution might be brought following a state prosecution. See *Petite* v. *United States*, 361 U.S. 529 (1960); *Rinaldi* v. *United States*, 434 U.S. 22 (1977).[17]

In sum, none of petitioner's policy arguments should dissuade this Court from giving effect to the unambiguous terms of 18 U.S.C. 3243, under which the State of Kansas had jurisdiction to prosecute him for his crime of aggravated battery.

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[17] Moreover, at the time Section 3243 was under consideration, there was apparently no basis for the Kansas Indians to fear actual injustice in the form of unequal treatment at the hands of the State. The Department of the Interior's memorandum noted that "the superintendent in charge of the Kansas reservations * * * states that in the State courts 'an Indian may not only expect a square deal but, if anything, there is a tendency to be more lenient' " with Indians in comparison with other offenders. House Report at 4; Senate Report at 4.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

VICKI A. O'MEARA
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

EDWARD J. SHAWAKER
KATHERINE L. ADAMS
Attorneys

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No. 91-5397

In The

Supreme Court of the United States

October Term, 1992

EMERY L. NEGONSOTT,

Petitioner,

v.

HAROLD SAMUELS, WARDEN, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF AMICI CURIAE OF THE IOWA TRIBE OF KANSAS AND NEBRASKA; KICKAPOO NATION IN KANSAS; AND THE PRAIRIE BAND POTAWATOMI INDIAN TRIBE OF KANSAS IN SUPPORT OF PETITIONER

Melodie L. McCoy
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel of Record
for *Amici Curiae*

October, 1992

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MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME

Pursuant to Rule 37, *amici curiae* consisting of three federally-recognized Indian tribes, respectfully move this Court for leave to file the attached brief *amici curiae* in support of Petitioner Emery Negonsott out of time. The reasons in support of this motion are as follows.

Petitioner's brief in this case was due and filed on August 31, 1992. Under Rule 37.3, the brief of *amici* would have been due on that date. However, due to the press of other responsibilities, *amici* were unable to obtain counsel to present their views in this important case until after Petitioner's brief was due.

Petitioner and the Respondent State of Kansas have consented to the filing of the brief of *amici* and to the filing of the brief out of time.[1] Moreover, Respondent has requested an extension of time to file its brief until October 26, 1992. As this motion and brief are being filed on October 19, 1992, the proceedings in this case will not be delayed by the late filing of *amici's* brief.

Dated this 19th day of October, 1992

Respectfully submitted,

Maloow L. McCoy
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
Counsel of Record
for Amici Curiae

[1] The consents are submitted for filing herewith.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are three federally-recognized Indian tribes whose reservations are wholly or partly within the State of Kansas. The Iowa Tribe of Kansas and Nebraska has 275 members and 923 acres of tribal trust land in Kansas.[1] Another 206 acres of land in Kansas is held in

[1] The Iowa Tribe also has 491 acres of trust land in Nebraska.

trust for individual members of the Iowa Tribe. The Kickapoo Nation in Kansas has 727 members and 6,683 acres of tribal trust land. The Prairie Band Potawatomi Indian Tribe of Kansas has 610 members and 22,698 acres of tribal trust land.

The issue in this case – the existence of state jurisdiction and the scope of federal jurisdiction over major crimes committed by tribal members on their reservations – is one in which *amici* have a substantial interest. Under the Kansas Act of 1940, 18 U.S.C. § 3243, the State of Kansas is attempting to prosecute in state court Indians who commit major crimes on their reservations.

Amici wholly support effective law enforcement on their reservations. However, under the Major Crimes Act of 1885, 18 U.S.C. § 1153, tribal members already are subject to criminal prosecution in the federal courts for major crimes enumerated in that Act which are committed in Indian country. To the extent the Kansas Act authorizes the state to exercise some criminal jurisdiction over Indians, *amici* strenuously object to that jurisdiction extending beyond that which has been granted by Congress. This is especially so when such an extension would subject tribal members to additional prosecutorial schemes.

The issue here also poses a significant threat to the treaty rights of *amici*. In their treaties with the United States, *amici* ceded millions of acres of land in exchange for their reservations and the right to be self-governing

on those reservations.[2] A corollary guarantee of the right to tribal self-government is the right of Indians to be free from state jurisdiction on their reservations. *Amici* oppose the diminishment of their treaty rights and note that at least one *amici* tribe went on record as objecting to the passage of the Kansas Act at issue here.

Petitioner has set forth reasons the decision of the Court of Appeals is in direct conflict with the language and intent of the Major Crimes Act. In this brief, *amici* present additional reasons for reversing the Court of Appeals' decision.

SUMMARY OF ARGUMENT

Under the Kansas Act of 1940, the State of Kansas is attempting to prosecute an Indian for the commission of a major crime in Indian country. However, the grant of jurisdiction over reservation Indians to the state in that Act is qualified by an express mandate against depriving the federal courts of their jurisdiction over Indians. Under the Major Crimes Act of 1885, the federal courts have exclusive jurisdiction over major crimes committed by Indians in Indian country.

The Court of Appeals below erroneously concluded that, notwithstanding the Major Crimes Act, the Kansas Act authorizes concurrent jurisdiction in the state courts over major crimes by Indians. That interpretation

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[2] *E.g.*, Treaty with the Iowa of May 17, 1854, 10 Stat. 1069; Treaty with the Kickapoo of May 18, 1854, 10 Stat. 1078; Treaty with the Potawatomi Nation of June 5 and 17, 1846, 9 Stat. 853.

"deprives" federal jurisdiction of its exclusivity in violation of the ordinary, plain meaning of the Kansas Act mandate against deprivation. In the case of sovereign jurisdiction, exclusivity is paramount – to reduce it even to concurrent is commonly understood to be a deprivation. Thus, by its terms, the Kansas Act preserves exclusive federal jurisdiction and precludes concurrent state jurisdiction over major crimes by Indians in Indian country.

Alternatively, assuming *arguendo* this Court should find that the Kansas Act is ambiguous regarding jurisdiction over major crimes, the Court should nevertheless find that state jurisdiction over major crimes by Kansas Indians in Indian country is prohibited. Special Indian law canons of construction – under which, ambiguous Indian statutes or provisions must be construed liberally in favor and to the benefit of the Indians – as well as other historical and jurisprudential doctrines compel this result.

Congress has traditionally and fastidiously exempted Indians in Indian country from state jurisdiction. Criminal jurisdiction is the most important and pervasive area in which Congress has done so. It also is significant that, regarding major crimes of the type at issue here, this Court has for over 100 years construed jurisdiction to be exclusive in the federal courts unless Congress has provided otherwise with manifestly clear intent. The reason underlying Congress' and this Court's traditional treatment of major crime jurisdiction as exclusively federal is the need to protect Indians from hostility toward and bias against them by non-Indians.

This need for protection against undue hostility, bias, and state interference was and continues to be a concern of the Kansas tribes. The Court of Appeals below erred in finding that the tribes requested the extension of state jurisdiction over them by the Kansas Act. The legislative history clearly shows that at least one tribe repeatedly objected to its passage. The other tribes did not understand the Act to affect exclusive federal jurisdiction over major crimes.

ARGUMENT

I. INTRODUCTION

The Kansas Act of 1940, 62 Stat. 827, provides that:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

18 U.S.C. § 3243.

The phrase "offenses defined by the laws of the United States committed by or against Indians on Indian reservations" refers to, *inter alia*, the Major Crimes Act of 1885, 23 Stat. 385. That Act provides that:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C. § 1153.[3]

It is not disputed in this case that, as between the federal and state governments, jurisdiction over major crimes committed by Indians in Indian country is exclusive in the federal courts under the Major Crimes Act.[4]

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[3] Exclusive subject matter jurisdiction over, *inter alia*, prosecutions under the Major Crimes Act is given to the federal courts by 18 U.S.C. § 3231.

[4] Notwithstanding the Major Crimes Act, tribes retain inherent authority to prosecute major crimes under tribal law committed by their members on Indian lands. *See* United States v. Wheeler, 435 U.S. 313, 325 (1978) ("far from depriving Indian tribes of their sovereign power to punish offenses against tribal law by members of tribe, Congress has repeatedly recognized

The issue is whether the Kansas Act altered that express provision for the state of Kansas, and made jurisdiction over major crimes concurrent between the federal and state governments, or whether it left the federal exclusivity of the Major Crimes Act intact.

The Court of Appeals below held that jurisdiction is concurrent. *Negonsott v. Samuels*, 933 F.2d 818 (10th Cir. 1991). The opposite conclusion was reached in *Youngbear v. Brewer*, 549 F.2d 74 (8th Cir. 1977), which held that, notwithstanding the Iowa Act of 1948, 62 Stat. 1161, which is virtually identical to the Kansas Act, jurisdiction over major crimes remains exclusively federal. For the following reasons, the *Youngbear* decision is correct and the Court of Appeals' decision below here should be reversed.

II. THE STATE CANNOT EXERCISE CRIMINAL JURISDICTION OVER MAJOR CRIMES COMMITTED BY INDIANS ON THEIR RESERVATIONS BECAUSE, BY ITS TERMS, THE KANSAS ACT LEAVES THAT JURISDICTION EXCLUSIVELY WITH THE FEDERAL COURTS UNDER THE MAJOR CRIMES ACT

"Interpretation of a statute must begin with the statute's language." *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 300 (1989). "[T]he language of a statute controls when sufficiently clear in its context." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). "[U]nless otherwise

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that power and declined to disturb it"). In this brief, the term "exclusive" is used to mean exclusive as between the federal and state governments.

defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

Under these fundamental rules of statutory construction, it is sufficiently clear that the Kansas Act left exclusive jurisdiction over major crimes to the federal courts. This conclusion is reached by giving plain meaning to the words in the qualifying second sentence of the Kansas Act "shall not deprive the courts of the United States of jurisdiction. . . . " "Deprive" ordinarily means to withhold, remove, or take away. Under the Major Crimes Act, federal jurisdiction over major crimes by Indians is exclusive. If that jurisdiction is made concurrent with state courts, then federal jurisdiction is no longer exclusive. In other words, the federal courts have been deprived of their exclusivity.

The importance of exclusivity where sovereign jurisdiction is concerned often has been recognized. For example, in *Williams v. Lee*, 358 U.S. 217 (1959), this Court held that jurisdiction over civil causes of action arising on the reservation brought by non-Indians against Indians is exclusive in the tribal courts.

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.

358 U.S. at 223. The Court easily assumed that even *concurrent* state jurisdiction would unduly interfere with tribal sovereign powers. *Accord Fisher v. District Court*, 424 U.S. 382 (1976) (tribal court jurisdiction over adoption

proceedings where all parties are tribal members and reservation residents is exclusive of state court jurisdiction); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that federal jurisdiction for issues other than habeas corpus arising under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03, would interfere with tribal autonomy and self-government).

Similarly, in *Callaway v. Benton*, 336 U.S. 132, 154-55 (1949) (Douglas, J., dissenting), it was noted that "[i]f state courts can intrude with injunctions on such state law questions [in certain interstate commerce matters], the exclusive command of the federal agencies over the reorganization process is lost. . . . " *Accord* Note, *Mixed Arbitrable and Nonarbitrable Claims in Securities Litigation: Dean Witter Reynolds, Inc. v. Byrd*, 34 Cath. U.L. Rev. 525, 528 (1985) ("if issues relevant to the federal claim are decided in arbitration or state court, the federal court may be deprived of its exclusive jurisdiction"). In other contexts, it is commonly understood that a loss of exclusivity amounts to a deprivation. *See, e.g., Carroll v. Lanza*, 349 U.S. 408, 412 (1955) (where a remedy, made exclusive by state law, has been qualified or contravened by the law of another state, it has been "deprived" of its exclusivity).

Thus, to say, as the Solicitor General does, *Amicus Curiae* Br. of U.S. on Pet. for a Writ of Cert. at 7, – with no citation to authority – that concurrent state court jurisdiction under the Kansas Act over major crimes does not deprive the federal courts of jurisdiction, is at odds with the plain meaning of the language of the Kansas Act. To the extent there are instances where a loss of exclusivity does not amount to a deprivation, in the case of sovereign jurisdiction, exclusivity is paramount. To lose it, albeit

while retaining concurrent authority, is a deprivation. Hence, the plain language of the Kansas Act preserves exclusive federal jurisdiction and operates to preclude a finding of concurrent state jurisdiction over major crimes which are exclusively federal.

III. ALTERNATIVELY, TO THE EXTENT THE KANSAS ACT IS UNCLEAR, THE STATE IS BARRED FROM EXERCISING JURISDICTION OVER INDIANS WHO COMMIT MAJOR CRIMES ON THEIR RESERVATIONS UNDER LONGSTANDING PRINCIPLES OF FEDERAL LAW

Amici maintain that the language of the Kansas Act is clear on its face regarding the intent to leave exclusive jurisdiction over major crimes with the federal courts. However, assuming *arguendo* that this Court should find that the language is ambiguous,[5] this Court should nevertheless find that jurisdiction over major crimes by Kansas Indians in Indian country is exclusively federal.

As this Court stated unequivocally just last term in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, ___ U.S. ___, 112 S.Ct. 683 (1992):

> When we are faced with . . . two possible constructions [of an Indian law statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'

[5] Indeed, the Court of Appeals below, 933 F.2d at 820-21, and the Court of Appeals in *Youngbear*, 549 F.2d at 76, both concluded that the Kansas Act is ambiguous regarding jurisdiction over major crimes.

112 S.Ct. at 693. These Indian law canons of construction and other longstanding jurisprudential doctrines compel the preclusion of state jurisdiction over major crimes committed by Indians in Indian country in Kansas.

A. As Between The Federal And State Governments, Congress Has Historically Committed Criminal Jurisdiction Over Indians To The Federal Government

In *County of Yakima*, this Court noted that Congress' exemption of Indians in Indian country from state jurisdiction is grounded in its constitutional authority under the Commerce Clause and Treaty Clause. 112 S.Ct. at 687. Under this "deeply rooted" policy of leaving Indians "free from state jurisdiction and control," *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973), criminal law is the area in which federal jurisdiction has been most pervasive. *See generally* F. Cohen, *Handbook on Federal Indian Law* 286-308 (1982 ed.); *see also* R. Clinton, N. Newton, & M. Price, *American Indian Law* 275 (3rd ed. 1991) ("One of the earliest and most far-reaching federal regulatory intrusions into Indian county has been in the area of federal criminal jurisdiction").

For example, since 1817, the General Crimes Act, 18 U.S.C. § 1152, has made the general criminal laws of federal maritime and enclave jurisdiction applicable to Indian country. Since 1885, the Major Crimes Act has provided for exclusive federal prosecution of Indians

within Indian country for the commission of crimes enumerated in that Act. These Acts descend from early treaties between the United States and the tribes, many of which provided for federal criminal jurisdiction in Indian country. F. Cohen, *Handbook of Federal Indian Law* at 287-89.

Thus, any ambiguities in the Kansas Act regarding jurisdiction should be resolved in favor of the traditional treatment by Congress of such matters. In short, the intent of Congress to alter the historically exclusive federal jurisdictional scheme in Indian country with a narrow exception such as the Kansas Act must be manifestly clear. *See, e.g.*, 18 U.S.C. § 1162 and 25 U.S.C. §§ 1321-26 (commonly known as "Public Law 280," wherein, in 1953, Congress extended or authorized the extension of certain state criminal and civil jurisdiction into certain Indian country, and expressly excluded application of the Major Crimes Act to areas covered by Public Law 280). If the language and intent are equivocal, then this Court should presume that Congress intended to continue its long-standing practice of leaving jurisdiction over Indians in Indian country exclusively federal. *See Bryan v. Itasca County*, 426 U.S. 373, 389 (1976) ("Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws. . . . "); *see also Tafflin v. Levitt*, 493 U.S. 455, 472 (1990) (Scalia, J., concurring) ("implied preclusion [of state court jurisdiction] can be established by the fact that a statute expressly mentions only federal courts, plus the fact that state-court jurisdiction would plainly disrupt the statutory scheme").

B. A Long Line of Cases Of This Court Have Upheld Exclusive Federal Jurisdiction Under The Major Crimes Act

As the Court of Appeals in *Youngbear* noted, 549 F.2d at 75, this Court has long interpreted the Major Crimes Act as granting federal courts exclusive jurisdiction over the enumerated major crimes therein. *E.g., United States v. Kagama*, 118 U.S. 375 (1886); *Williams v. Lee*, 358 U.S. at 220 n.5; *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Keeble v. United States*, 412 U.S. 205 (1973); *United States v. John*, 437 U.S. 634 (1978).

If the language and intent of the Kansas Act are unclear, there is no reason for this Court to depart from its prior constructions of the Major Crimes Act. *See County of Yakima*, 112 S.Ct. at 688, ("our cases reveal a consistent practice of declining to find that Congress has authorized [state jurisdiction over reservation Indians] unless it has 'made its intention to do so unmistakably clear' "). To construe the Kansas Act as giving the state concurrent jurisdiction over major crimes notwithstanding the express language of the Major Crimes Act would, as Petitioner argues, Pet. Op. Br. at 8-11 & 14, "impliedly repeal" the exclusivity of the Major Crimes Act.

It is fundamental that implied repeals of an earlier statute by a later one are not favored, especially where the statutes can be read without conflict to give effect to both statutes. *United States v. Fausto*, 484 U.S. 439, 452-53 (1988). Here, the only way to give effect to all phrases of both the Kansas Act and the Major Crimes Act is to find, as the Court of Appeals in *Youngbear* did with respect to

the Iowa Act, 594 F.2d at 76, that the Kansas Act merely authorizes state jurisdiction over those crimes that are not within exclusive federal jurisdiction such as major crimes. As this Court has continually held, jurisdiction over major crimes remains exclusive with the federal courts.

C. Federal Indian Policy Weighs In Favor of Exclusive Federal Jurisdiction Over Major Crimes By Indians

In *United States v. Kagama*, which tested the constitutionality of the Major Crimes Act, this Court justified federal jurisdiction over Indians who commit crimes under the Act in part on the basis of the potential prejudice of local juries against Indians.

> Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

118 U.S. at 384.

Around the time of the passage of the Kansas Act, in *Rice v. Olson*, 324 U.S. 786 (1945), this Court reemphasized that:

> The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history. In light of this historical background Congress in 1885 passed a comprehensive Act [the Major Crimes Act] in order to fulfill treaty stipulations with various Indian Tribes. . . . The last section of that Act subjects

> Indians who commit certain crimes . . . [to the exclusive jurisdiction of the federal courts.]

324 U.S. at 789 (citations omitted).

Given its trust responsibility to Indian tribes and its commitment to federal jurisdiction over Indian people, particularly in the area of criminal jurisdiction, Congress was undoubtedly aware of the ever-present animosity towards Indians at the time it enacted the Kansas Act. The Kansas Act, although in some ways a departure from traditional Indian statutes, nevertheless reflects a balance of the basic interests which Congress historically has considered in Indian law: to the extent the Kansas Indians needed effective law enforcement protection, they also needed to be protected from undue hostility and interference by the state. The compromise was to give the state of Kansas full jurisdiction over minor crimes, but to keep jurisdiction over major crimes exclusive in the federal courts.

The potential for hostility towards and bias against reservation Indians accused of major crimes remains a concern today in Kansas, where non-Indians typically outnumber Indians. It could, for example, affect the state court triers of fact. It would be anomalous for this Court to gut a fundamental purpose underlying much of federal Indian policy – the protection of Indians – to which Congress so often has responded clearly in laws such as the Major Crimes Act and which this Court itself noted around the time of the passage of the Kansas Act, by allowing the state to exercise jurisdiction over major crimes committed by Indians on their reservations.

D. The Court Of Appeals Erred In Finding That The Kansas Tribes Approved Of The Kansas Act; To The Contrary, The Legislative History Shows That The Indians Objected To The Extension Of State Jurisdiction

Tribal sovereign interests provide a "backdrop against which the applicable [Indian law] treaties and federal statutes must be read." *McClanahan*, 411 U.S. at 172. In concluding that the Kansas Act intended to give the state concurrent jurisdiction over major crimes, and in determining that such an interpretation did not violate the Indian law canons of construction, the Court of Appeals stated:

> The Kansas tribes themselves, in the interest of establishing law and order on Indian lands, 'expressed a wish that the jurisdiction hitherto exercised by the State courts [over both major and minor crimes] be continued.' House Report at 4-5. We are unwilling to conclude that state court criminal jurisdiction *conferred by Congress in response to tribal requests* invades the special relationship between the tribes and the federal government. If anything, the Kansas Act reflects congressional responsiveness to Tribal needs for unified law enforcement as expressed by the Tribes themselves.

933 F.2d at 823 (brackets, citation, and emphasis in original).

The Court of Appeals was quoting from and referring to the Letter from E.K. Burlew, Acting Secretary of the Interior, to Rep. Will Rogers, Chairman of the House Committee on Indian Affairs, *reprinted in* H.R. Rep. No. 1999, 76th Cong., 3d Sess. 2 (1940). Similarly, in support

of its argument before this Court for concurrent jurisdiction, the Solicitor General states that "the Indians in Kansas did not object to this regime, and in fact sought enactment of [the Kansas Act] to clarify the legality of the State's exercise of jurisdiction. . . . " *Amicus Curiae* Br. of U.S. on Pet. for a Writ of Cert. at 9-10.

However, the legislative history of the Kansas Act shows clearly that at least one tribe repeatedly objected to the passage of the Kansas Act, right up until the time of its enactment. On May 8, 1939, James Wahbnosah, Chairman of the Business Committee of the Prairie Band Potawatomi Indian Tribe of Kansas, telegrammed Rep. Will Rogers, Chairman of the House Committee on Indian Affairs that the "POTAWATOMI INDIAN COUNCIL REQUESTS THAT HOUSE BILL 3048 NOT BE PASSED LETTER FOLLOWS." In the letter, also dated May 8, 1939, Chairman Wahbnosah wrote:

> We the Business Committee of the Prairie Band of Potawatomie Indians located at Mayetta Jackson County Kansas voted by majority of council to oppose the introduction of House Bill #3048. The resolution was presented by the Superintendent of this reservation and was turned down by a majority of the Business Committee. Its presentation was a forgery. We did not want it.

Receipt of the telegram and letter were acknowledged by Chairman Rogers in his letter dated May 10, 1939 to Chairman Wahbnosah, in which he stated, "Feel free to keep me advised on legislation affecting your tribe. Your letters are being filed with the House Committee on Indian Affairs."

On May 16, 1939, Chairman Wahbnosah wrote Chairman Rogers that "[t]he Business Committee of the Prairie Band Potawatomi tribe of Indians represents eleven-hundred of the sixteen-hundred Indians of Kansas, five-hundred of these Indians are being represented by the councils of the Kickapoo, Iowa and Sac & Fox tribes. I beg to urge all you can in your power to stop this H.R. 3048."

On April 25, 1940, Chairman Wahbnosah again wrote Chairman Rogers that "[w]e have noted in A.P. News releases dated Washington, D.C. April 21, 1940, that the House Indian Affairs Committee has approved a Bill #3048 Providing for surrendering of Jurisdiction over offenses committed on Indian Reservations to the State of Kansas." He explained that "the Indians of Kansas" protested the bill.

On May 2, 1940, Chairman Wahbnosah wrote the Hon. E.K. Burlew, Acting Secretary of the Interior, and questioned the statement in Burlew's March 16, 1940 letter, the letter reprinted in H.R. Rep. No. 1999, that "the tribal councils of the four Kansas tribes have recommended the enactment of" H.R. 3048. In Chairman Wahbnosah's words:

> [W]hen and where was this recommendation given to the Superintendent? The Legally elected Potawatomi Business Committee in one of the meetings were against this Bill and vetoed it when it was put up for vote. . . . The Legally elected Business Committee of the Prairie Band of Potawatomi Indians in Kansas have never approved nor authorized the Superintendent here to recommend to Congress any such drastic and unfair law as is proposed in #3408. There is now existing Law on the Statutes under title eighteen criminal code to handle any class of crime committed by Indians and therefore this proposed #3408 is un-warranted.

On May 6, 1940, Chairman Rogers acknowledged receipt and filing of a copy of Chairman Wahbnosah's letter to Burlew.

All of the above-referenced correspondence are public documents on file in the National Archives under Record Group 233, H.R. 76A-D16, H.R. 3048. They show that the Potawatomi Tribe repeatedly went on record as objecting to any state jurisdiction over Indians on its reservation. And, as evidenced by the filing of this brief, the Kickapoo and Iowa Tribes did not understand the Kansas Act to affect exclusive federal jurisdiction under the Major Crimes Act.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reserved.

Respectfully submitted,

Melody L. McCoy
Native American Rights Fund
1506 Broadway
Boulder, CO 80302

(303) 447-8760

Counsel of Record for *Amici Curiae*

No. 91-5397

In The

Supreme Court of the United States

October Term, 1992

EMERY L. NEGONSOTT,

Petitioner,

v.

HAROLD SAMUELS, WARDEN, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICI CURIAE DEVILS LAKE SIOUX TRIBE OF THE FORT TOTTEN INDIAN RESERVATION, NORTH DAKOTA and SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA OF THE MESQUAKIE SETTLEMENT, IOWA IN SUPPORT OF PETITIONER

BERTRAM E. HIRSCH
81-33 258 Street
Floral Park, New York 11004
(718) 347-3022

Counsel of Record for Amici Curiae

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INTEREST OF AMICI CURIAE

This brief is submitted with the written consent of all parties to the case, lodged with Clerk. Amici are the only two tribes outside of the State of Kansas affected by statutes identical to 18 U.S.C. §3243, the statute at issue here. See, Act of May 31,

1946, 60 Stat. 229, conferring criminal jurisdiction on the State of North Dakota with respect to crimes committed by or against Indians on the Devils Lake Indian Reservation (also known as the Fort Totten Indian Reservation), and Act of June 30, 1948, 62 Stat. 1161, conferring criminal jurisdiction on the State of Iowa with respect to crimes committed by or against Indians on the Sac and Fox Indian Reservation (also known as the Mesquakie Settlement).

ARGUMENT

The State Of Kansas Has No Jurisdiction Under 18 U.S.C. §3243 To Prosecute Crimes Included In The Indian Major Crimes Act, 18 U.S.C. §1153.

The only issue presented in this appeal is whether 18 U.S.C. §3243 conferred criminal jurisdiction on the State of Kansas to prosecute Indians for offenses committed on an Indian reservation when the offense is subject to federal criminal

jurisdiction under the Indian Major Crimes Act, 18 U.S.C. §1153. Put another way, the issue is whether, after enactment of §3243, federal criminal jurisdiction under §1153 remains exclusive with respect to the crimes enumerated therein. The courts below, both finding §3243 to be "ambiguous" on this issue, J.A. at 12, 22, concluded that the State of Kansas and the federal government have concurrent jurisdiction over Indian offenses falling within the Indian Major Crimes Act. The identical 1948 Iowa Act has been construed to exclude state jurisdiction over such Indian offenses. Youngbear v. Brewer, 415 F.Supp. 807 (N.D. Iowa 1976), aff'd., 549 F.2d 74 (8th Cir. 1977).

Section 3243 was the first of several enactments conferring criminal jurisdiction on states over crimes committed in Indian country. The language and legislative

history of these various statutes places §3243 in a contextual framework that supports the Eighth Circuit's analysis in Youngbear.

Section 3243 and its progeny were each enacted to fill a criminal law enforcement void on Indian reservations. While the federal government had exclusive criminal jurisdiction over the major crimes enumerated in §1153 and over certain other crimes covered by 18 U.S.C. §1152 and other federal laws, tribal governments, as many do today, retained exclusive jurisdiction over numerous non-major crimes, not defined by the laws of the United States, where both the offender and the victim were Indians or where the offender was Indian and the victim was non-Indian. Unfortunately, some tribes did not have the institutions in place to exercise this jurisdiction, leaving petty crimes

unaddressed. It was this problem that motivated the enactment of §3243. H.Rep.No. 1999, 76th Cong. 3d Sess. 2-5 (April 22, 1940); S.Rep.No. 1523, 76th Cong. 3d Sess. 2-4 (April 25, 1940). Kansas Congressman W.P. Lambertson, sponsor of the measure that became §3243, 84 Cong Rec. 662, 76th Cong. 1st Sess. (1939), stressed this in his statement to the House Committee on Indian Affairs five days before the Committee reported the bill. "The Government here relinquishes to the State full jurisdiction over the Indians for small offenses." H.Rep.No. 1999, supra, at 2.[1]

The several subsequent similar statutes were motivated by the same concern. The

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[1] "It is the sponsors that we look to when the meaning of the statutory words is in doubt." Woodwork Manufacturers v. NCRB, 386 U.S. 612, 640 (1967); Schwegmann Bros. v. Calvert Distilleries Corp., 341 U.S. 384, 394-395 (1951).

1946 North Dakota Act, for example, was enacted because the "status of jurisdiction over these [Devils Lake Sioux] Indians is somewhat confused," and the Tribe did not have a tribal court to prosecute Indian offenders. S.Rep. No. 997, 79th Cong. 2d Sess. 2 (February 27, 1946); H.Rep.No. 2032, 79th Cong. 2d Sess. 2 (May 13, 1946).[2] There was clearly no confusion in 1946 regarding federal exclusive criminal jurisdiction to prosecute Indian and other offenders under either §1152 or §1153. The only confusion concerned crimes not subject to these sections. The purpose of the

[2] For some forty years, The Devils Lake Sioux Tribe has had a Court of Indian Offenses established and operated by the Secretary of the Interior under 25 C.F.R. Part 11. The Court exercises criminal jurisdiction over all Indian offenders who commit any of the 66 offenses enumerated in 25 C.F.R. §§11.38-11.98ME and additional offenses contained in the tribal code. State law enforcement and the exercise of State criminal jurisdiction on the Tribe's reservation has been rare and has not involved major crimes.

statute was to assure state law enforcement and criminal jurisdiction over crimes not already subject to exclusive federal jurisdiction and over which the Tribe was not prepared to exercise criminal jurisdiction.[3]

The 1948 Iowa Act which, like the 1946 North Dakota Act, is identical in language to the 1940 Kansas Act, most clearly demonstrates the purpose of Congress to retain exclusive federal jurisdiction over Indian offenders who commit a crime enumerated in §1153. Noting that conferring criminal jurisdiction on the State of Iowa would "establish no precedent" because "[s]imilar acts have been passed conferring jurisdiction on the State of Kansas and North Dakota", H.Rep.No. 2356, 80th Cong.

[3] Recently, the North Dakota Supreme Court reserved the question of whether the 1946 Act conferred jurisdiction on the State over major crimes. State v. Hook, 476 N.W.2d 565, 571 n. 6 (N.D. 1991).

2d Sess. 2 (June 15, 1948), the House Report most clearly articulates congressional intent.

> The need of this legislation arises from the fact that in certain instances, Indian tribes do not enforce the laws covering offenses committed by Indians; under the present law the State has no jurisdiction to enforce laws designed to protect the Indians from crimes perpetrated by or against Indians; and law and order should be established on the reservation when the tribal laws for the discipline of its members have broken down.
>
> The bill contains no mandatory provisions whereby the State is bound to enforce the criminal laws in all instances of crime, but is permissory in nature and will establish a uniformity of jurisdiction in the State of Iowa which may be used to enforce the law when deemed proper and necessary by State officials and when law enforcement by Indian courts is deemed unsatisfactory.

Id. at 1. The Justice Department and the Department of the Interior supported the legislation primarily because, in the absence of a tribal court, no court had jurisdiction over crimes, not defined by federal law, committed by Indians against

other Indians. Id. at 2-3. See also, S.Rep.No. 1490, 80th Cong. 2d Sess. 2-3 (June 4, 1948).[4]

Contemporaneous with consideration of the Iowa Act, H.R. 4725 was passed by the House, 94 Cong.Rec. 2854-2855, 80th Cong. 2d Sess. (March 15, 1948), and reported in the Senate. S.Rep.No. 1142, 80th Cong. 2d Sess. (April 20, 1948). The measure, reprinted at 94 Cong.Rec. 2855, conferred jurisdiction on each State "over offenses committed by or against Indians on Indian reservations or parts thereof" while preserving federal criminal jurisdiction

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[4] After enactment of the 1948 Iowa Act, the murder charge against Ellsworth Youngbear in 1974 appears to have been the first reported federal major crime committed by an Indian on the Sac and Fox Reservation. Since the Eighth Circuit's 1977 Youngbear decision, major crimes on the reservation have been virtually unknown. In addition, State law enforcement and the exercise of criminal jurisdiction with respect to minor crimes has also been rare.

over such offenses when defined by the laws of the United States. The substantive language of the measure is identical to the language of the Kansas, North Dakota and Iowa acts. Both the House and Senate Reports on the measure note that the 1940 Kansas Act and the 1946 North Dakota Act established the precedent for enactment of general legislation conferring criminal jurisdiction on the States. The House Report explains the legislative purpose.

> The need of this legislation arises from the fact that in certain instances, Indian tribes do not enforce the laws covering offenses committed by Indians; under the present law the States have no jurisdiction to enforce laws designed to protect the Indians from crimes perpetrated by or against Indians; and to establish law and order on Indian reservations when the need arises.
>
> This legislation will establish a uniformity of jurisdiction in all States which may be used to enforce the law when deemed proper and necessary by State officials and when law enforcement by Indian courts is deemed unsatisfactory....
>
> This bill contains no mandatory

> provisions whereby the States are bound to enforce the criminal laws in all instances of crime, but is permissory in nature and vests concurrent jurisdiction[5] in the States insofar as State laws are concerned....
>
> It is expected under the proposed legislation that local [State] policing will only step in when both Indian and Federal police protection has broken down.

H.Rep.No. 1506, 80th Cong. 2d Sess. 1-3 (March 4, 1948). After the House passed the bill on March 15, the Senate Committee on Interior and Insular Affairs reported the bill with a technical amendment "to make it clear that the provisions of this bill, if enacted, will confer jurisdiction on State courts over minor offenses committed by Indians." S.Rep.No. 1142, supra, at 1. The Truman administration opposed the bill on

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[5] This reference to "concurrent jurisdiction" was necessitated by §3 of the bill which, in part, provided: "Nothing contained in this act shall deprive any Indian governing body of jurisdiction over offenses defined by the laws of such body...." 94 Cong.Rec. 2855.

the ground that a transfer of jurisdiction over Indian reservations having adequate tribal court and law enforcement systems was unjustified. Id. at 3; H.Rep.No. 1506, supra, at 2-3.

Two days after the 1948 Iowa Act became law, a similar measure pertaining to New York became law. 25 U.S.C. §232. The measure was a response to a New York State legislative resolution memorializing Congress to confer criminal jurisdiction on the State of New York over offenses committed by Indians on Indian reservations "excepting only those matters wherein jurisdiction has been or hereafter shall be expressly assumed by the Federal Government." H.Rep.No. 2355, 80th Cong. 2d Sess. 2 (June 15, 1948); S.Rep.No. 1489, 80th Cong. 2d Sess. 2 (June 4, 1948). The United States Attorney for the western district of New York also urged enactment

of the measure. His concern was focussed on "petty offenses [that] are committed [by Indians] on the reservation and nothing much is being done about it." H.Rep.No. 2355 at 3; S.Rep.No. 1489 at 3. These "petty offenses" were described as disorderly conduct, driving while intoxicated, and fighting while intoxicated. H.Rep.No. 2355 at 3; S.Rep.No. 1489 at 2-3. The Department of the Interior endorsed the measure as well, noting that "[n]one of the Indian groups in the State have courts which now handle crimes not subject to Federal jurisdiction....[T]hey would be benefited by the imposition of State criminal laws which would not conflict with Federal jurisdiction." H.Rep.No. 2355 at 3-4; S.Rep.No. 1489 at 3. The Department recommended an amendment to incorporate the Kansas Act proviso concerning courts of the United States not

being deprived of jurisdiction over offenses defined by federal law. H.Rep.No. 2355 at 4; S.Rep. No. 1489 at 4.

Again noting the precedent for the legislation established by the Kansas and North Dakota Acts, the House Report describes the purpose of the New York bill.

> The need of this legislation arises from the fact that in certain instances, Indian tribes do not enforce the laws covering offenses committed by Indians; under the present law the State has no jurisdiction to enforce laws designed to protect the Indians from crimes perpetrated by or against Indians; and law and order should be established on the reservations when tribal laws for the discipline of its members have broken down.
>
> This bill contains no mandatory provisions whereby the State is bound to enforce the criminal laws in all instances of crime, but is permissory in nature and will establish a uniformity of jurisdiction in the State of New York which may be used to enforce the law when deemed proper and necessary by State officials and when law enforcement by Indian courts is deemed unsatisfactory.

Id. at 1-2. Section 232 was enacted without the proviso expressly preserving federal

jurisdiction. The Second Circuit has held that, nonetheless, the United States retains concurrent criminal jurisdiction over reservations in New York. United States v. Cook, 922 F.2d 1026, 1032-1033 (2nd Cir. 1991), cert.den., 111 S.Ct. 2235 (1991).[6]

The Congress did not again consider conferring State criminal jurisdiction over offenses committed by or against Indians in Indian country until 1953. That year P.L. 83-280 (18 U.S.C. §1162) was enacted. As originally introduced, the bill, utilizing language indistinguishable from the Kansas, North Dakota and Iowa acts, conferred

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[6] The Act of October 5, 1949, 63 Stat. 705, conferring criminal jurisdiction on the State of California over offenses committed on the Agua Caliente Indian Reservation had a legislative history similar to that of the Kansas, North Dakota, Iowa and New York laws. See, H.Rep.No. 956, 81st Cong. 1st Sess. (1949) and S.Rep.No. 669, 81st Cong. 1st Sess. (1949).

criminal jurisdiction only on the State of California and preserved federal jurisdiction over offenses defined by federal law. 99 Cong.Rec. 9962, 83d Cong. 1st Sess. (July 27, 1953). Prior to enactment, however, the bill was amended to confer Indian country criminal jurisdiction on five states and establish a procedure for every other state to assume such jurisdiction. The amendment also deleted any reference to continued federal criminal jurisdiction and provided that §1152, the General Crimes Act, and §1153, the Indian Major Crimes Act, "shall not be applicable within the areas of Indian country [in the five states] listed in subsection (a) of this section." Id. at 9963. See, 18 U.S.C. §1162(c).[7] Thus, for the first time since

[7] The Act of November 25, 1970, 84 Stat. 1358, amended 18 U.S.C. §1162(c) to add at the end thereof "as areas over which the several States have exclusive jurisdiction." This language was added to clarify the subsection, not to change its meaning. 116 Cong.Rec. 37354-37356, 91st Cong. 2d Sess. (November 16, 1970).

enactment of the Indian Major Crimes Act, the Congress expressly relinquished any §1153 jurisdiction and provided that certain states would exercise all of the criminal jurisdiction in Indian country theretofore exercised by the United States.[8]

The Senate Report described the need for general legislation conferring Indian country criminal jurisdiction on the states.

[8] Under P.L. 280, the States did not acquire exclusive criminal jurisdiction. Tribes in 280 states retain and continue to exercise criminal jurisdiction. Rosebud Sioux Tribe v. South Dakota, 709 F.Supp. 1502, 1512 n.19 (D.S.D. 1989), rev'd. on other grnds., 900 F.2d 1164 (8th Cir. 1990); Confederated Tribes of the Colville Indian Reservation v. Beck, No. C-78-76, 6 Ind.L.R. F-8, F-9 (E.D. Wash. 1978); Belgarde v. Morton, No. C74-683S, 2 Ind.L. R. (No. 9) 15, 18 (W.D. Wash. 1975); F. Cohen, Handbook of Federal Indian Law 367 (1982 ed.); 116 Cong.Rec. 37355, 91st Cong. 2d Sess. (November 16, 1970)(reprinting Department of the Interior position).

> The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called 10 major crimes....
>
> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

S.Rep.No. 699, 83d Cong. 1st Sess. (July 29 1953), 1953 U.S.C.C.A.N. 2411-2412. See, Bryan v. Itasca County, 426 U.S. 373, 379 (1976)(the primary concern of P.L. 280 was dealing with the problem of lawlessness and the absence of adequate tri l law enforcement on certain reservations).

From 1940-1953, Congress enacted a total of 6 statutes dealing with the extension of state criminal jurisdiction to Indian

country. Throughout the 14 years that Congress addressed this issue, the federal government's administration of its §1153 jurisdiction was never questioned or found to be inadequate. In fact, the legislative record reveals an intent to avoid interference with federal criminal jurisdiction. Rather, the focus was always on the gap in law enforcement and criminal jurisdiction resulting from the limited scope of §§1152 and 1153. The gap was consistently described. It concerned petty crimes, not defined by federal law, committed by Indians in Indian country, the one area of criminal law enforcement where Indian tribes had exclusive jurisdiction but, in many instances, were not effectively exercising this jurisdiction. In conferring jurisdiction on Kansas, North Dakota, Iowa, New York and other states, Congress emphasized that the conferral did

not mandate states to exercise the jurisdiction conferred. Congress repeatedly stated that its purpose was "to protect the Indians" from non-law abiding tribal members but only in circumstances where tribal law enforcement and criminal jurisdiction were ineffective Since tribes did not have jurisdiction over federal major crimes, it would appear that these acts did not contemplate State jurisdiction over major crimes.[9]

Unlike P.L. 280, the Kansas, North Dakota, Iowa and New York acts preserved federal §1152 and §1153 jurisdiction. This jurisdiction has always been held exclusive. See e.g., United States v. John, 437 U.S. 634, 651, 651-652 n. 22 (1978).

[9] If the conferral of state jurisdiction was intended to deal with a gap left by unsatisfactory federal administration of its §1153 jurisdiction, a conferral of jurisdiction that mandated state criminal law enforcement, as in P.L. 280 states, would have been necessary.

Unlike P.L. 280, nothing in these acts expresses a congressional intent to alter exclusive federal major crimes jurisdiction. The Kansas act, in fact, was amended before enactment to remove language that would have expressly made federal §1153 jurisdiction concurrent with the state criminal jurisdiction conferred. 86 Cong.Rec. 5596, 76th Cong. 3d Sess. (May 6, 1940).

Youngbear v. Brewer advances several additional premises for resolving the ambiguity in the Iowa Act in favor of exclusive federal major crimes jurisdiction. These include the time-honored policy of the United States to "leave Indians free from State jurisdiction." 415 F.Supp.at 811. In accord with this policy, tribal rights "to be tried exclusively in Federal court for alleged violations of the Major Crimes Act

should not be abrogated absent a clear expression from Congress." Id. at 812. The courts below acknowledge that the Kansas Act is ambiguous as to whether exclusive federal major crimes jurisdiction is retained. Absent an unambiguous statement from Congress that exclusive federal Indian major crimes jurisdiction is relinquished, any repeal of such federal jurisdiction would be by implication. See e.g., Menominee Tribe v. United States, 391 U.S. 404, 411 (1968)(Statutes should be construed to avoid repeals by implication); Randall v. Loftsgaarden, 478 U.S. 647, 661 (1986)(same).

Youngbear, id., also stresses the fundamental statutory construction principle that ambiguous statutes "passed for the benefit of dependent Indian tribes...are to be liberally construed, doubtful expressions being resolved in

favor of the Indians." Bryan v. Itasca County, supra, 426 U.S. at 392. This rule "is to be given 'the broadest possible scope.'" Andrus v. Glover Construction Co., 446 U.S. 608, 619 (1980)(citation omitted). The Kansas Act and its progeny were all enacted for the stated benefit of the Indians to provide needed protection against lawlessness described as minor offenses not defined by federal law and not addressed by the exercise of tribal jurisdiction. As Youngbear points out, resolving the ambiguity at issue in favor of concurrent federal/state jurisdiction over major crimes would subject tribal members to the possibility of prosecution by each sovereign "for essentially one offense," 415 F.Supp. at 812, a possibility not endorsed in the language or legislative histories of the Kansas Act or any subsequent related act. Moreover, the

unfortunate fact is that tribal communities continue to have a need to avoid state criminal jurisdiction, especially with respect to major crimes, for the reasons described in United States v. Kagama, 118 U.S. 375, 384 (1886)("Because of the local ill feeling, the people of the states where they [i.e., the Indians] are found are often their deadliest enemies"). The potential for double prosecution for the same criminal act would also single out Indians in this way solely on the basis of race. Non-Indians committing the identical criminal act could only be prosecuted once. Serious fifth amendment due process issues emerge, therefore, if the Kansas Act and its progeny are construed to permit concurrent federal/state major crimes jurisdiction. Clinton, "Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze," 18

Ariz.L.R. 503, 548-549 n. 223 (1976). The concurrent jurisdiction approach, taken by the courts below, does not resolve the "doubtful expression[]...in favor of the Indians."

A conclusion that the Kansas Act did not intend to eliminate exclusive federal Indian major crimes jurisidiction finds further support in this Court's instruction that "[c]ourts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach [i.e., promotion of tribal self-government] to what is, after all, an ongoing relationship."' Bryan v. Itasca County, supra, 426 U.S. at 389 n. 14 (citation omitted). From the Kansas Act in 1940 to P.L. 280 in 1953, each of the criminal jurisdiction statutes enacted by

Congress, as their language and legislative histories make clear, were motivated in part by an assimilationist policy. See e.g., S.Rep.No. 1490, 80th Cong. 2d Sess, supra, at 1 on the Iowa Act ("It must be recognized that in most if not all Indian communities, the Indians know what is and should be expected of them as to [State] law observances"); H.Rep.No. 2355, 80th Cong. 2d Sess., supra, at 3-4 on the New York Act ("Since these Indians have made considerable advancement and have a great deal of contact with non-Indians in their daily life outside the reservations, ...they would be benefited by the imposition of State criminal laws which would not conflict with Federal jurisdiction"); S.Rep.No. 1489, 80th Cong. 2d Sess., supra, at 1 on the New York Act ("Although it may be argued that the so-called Indian courts should be continued,

and that Indians should continue to be dealt with in accordance with Indian customs, nevertheless it must be recognized that in most, if not all, Indian communities the Indians know what is and should be expected of them as to law observance. It would seem, therefore, that the time has come for the Indians to be brought into conformity with the penal standards of the communities of which they form a part"). Since about 1960, this assimilationist policy has given way to a federal policy of promoting tribal self-determination and self-government, including the revitalization and strengthening of tribal law enforcement and judicial systems. Amici have been the beneficiaries of this policy as have the Kansas tribes. In view of the admittedly ambiguous language in the Kansas Act and its progeny regarding the continuation of

exclusive federal Indian major crimes jurisdiction, this Court should not strain to implement the assimilationist policy of the Kansas Act.

CONCLUSION

Considering that the Indian Major Crimes Act is a "'carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land,'" United States v. Wheeler, 435 U.S. 313, 325 n. 22 (1978)(citation omitted), the court below has significantly expanded this intrusion by construing the Kansas Act as conferring concurrent jurisdiction on the State over §1153 crimes.

Amici respectfully suggest that the decision of the court of appeals below was wrong and should be reversed.

August 31, 1992.

Respectfully submitted,

BERTRAM E. HIRSCH
81-33 258 Street
Floral Park, New York 11004

Counsel for Amici